RECORD AND BRIEFS

FILED
FEB 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

JOINT APPENDIX

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT

Commonwealth v. Weaver

No. SUCR2003-11293

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
106	06/08/2011	Notice of docket entry received from the Supreme Judicial Court. - Motion For New Trial. (Remanded to Superior Court)
		* * *
110	10/21/2011	Commonwealth files Memorandum in opposition to the defendant's motion for a new trial pursuant to MRCP 30(b) (Hines, J and R. Greenbert, Atty notified)
111	10/26/2011	Deft files Reply to the Commonwealth's opposition on the issue of public trial (Hines, J and A. Kalluri, ADA notified)
		* * *
115	03/21/2012	Hearing on the Defendant's Motion for a New Trial.
		* * *
117	04/23/2012	Commonwealth files

NO.	DATE	DESCRIPTION
		supplemental memorandum in opposition to Deft's motion for new trial pursuant to Mass Crim P. 30(b)
118	04/23/2012	Deft files proposed findings
		* * *
131	02/25/2013	Deft files Memorandum of decision and Order for new trial, filed. MOTION (P#131) denied Hines, J. (Copies mailed)
		* * *
155	03/13/2015	NOTICE of APPEAL FILED by Kentel Myrone Weaver

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Weaver v. Commonwealth

No. SJC-10932

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	03/09/2011	Entered. Notice to counsel.
2	03/23/2011	APPEARANCE of Ruth Greenberg, Esquire for Kentel Myrone Weaver. (Noted)
3	06/01/2011	MOTION FOR NEW TRIAL, filed for Kentel Myrone Weaver by Ruth Greenberg, Esquire. (Remanded to Superior Court) Notice sent.
4	06/01/2011	ORDER: Defendant's Motion for New Trial is remanded to Suffolk Superior Court.
		* * *
17	07/28/2015	APPEAL ON DENIAL OF MOTION FOR NEW TRIAL. Appellant's Brief/Appendix due 9/18/15.
		* * *
19	09/22/2015	SERVICE of brief & Appendix for Defendant/

NO.	DATE	DESCRIPTION
		Appellant Kentel Myrone Weaver by Ruth Greenberg.
		* * *
22	12/21/2015	SERVICE of brief for Plaintiff/Appellee Commonwealth by John P. Zanini.
	01/12/2016	Oral argument held. (Gants, C.J., Spina, J., Cordy, J., Duffly, J., Lenk, J.).
		* * *
31	07/20/2016	RESCRIPT (Full Opinion): The matter is accordingly remanded to the Superior Court for further proceedings consistent with this opinion. (By the Court)
		* * *
33	08/29/2016	Notice: Certiorari petition filed in U.S. Supreme Court.
34	01/23/2017	LETTER from Ruth Greenberg notifying the Court that a writ of certiorari was granted.
35	01/23/2017	Awaiting formal notice from the United States Supreme Court. Review of docket no. 16-240 indicates that the petition was granted on January 13, 2017.

Commonwealth *vs.* Kentel Myrone Weaver

SJC-0384CR11293

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Monday, March 26, 2012

MOTION FOR NEW TRIAL

PROCEEDINGS

THE CLERK: Your Honor, before the Court Commonwealth versus Kentel Weaver, Docket Number 2003-1129. Representing the Commonwealth is Assistant District Attorney John Pappas. The defendant is present and represented by his attorney, Ruth Greenberg. The matter is before the Court on a motion for new trial.

THE COURT: Good afternoon, everybody. I'm happy everybody is here. I saw Mrs. Weaver outside. Does she know where we are?

MS. GREENBERG: Yes. I had thought that since she was a witness she should wait outside.

THE COURT: Okay. That's fine. I didn't want anybody to be confused by the change in the location. Okay. So it's my understanding this that it is the defendant's burden on this case to prove that the courtroom was closed, and that it is the defendant's burden to either establish that there was some official judicial [5] act closing the courtroom or that it was closed in a constitutional sense. That's how I understand what we are doing here. Now I did receive Judge Neel's affidavit. It came in the mail on Friday afternoon. Counsel, did you all receive a copy of it?

MR. PAPPAS: Yes, Your Honor. And by agreement—I don't believe there is any objection, if I could have it marked as Exhibit Number 1.

THE COURT: All right. Thank you. (Exhibit Number 1 marked; Affidavit of J. Neel.)

THE COURT: Okay. So without further ado, we are ready to proceed. You may call your first witness.

MR. PAPPAS: One last housekeeping matter, Your Honor.

THE COURT: Yes.

MR. PAPPAS: Can we have a [6] sequestration order for purposes of this hearing.

THE COURT: Sure. All right.

MS. GREENBERG: My first witness is in the courtroom, Mr. Davis.

THE COURT: Your first witness is in the courtroom?

MS. GREENBERG: He is.

THE COURT: Oh, okay.

MS. GREENBERG: But before I call Mr. Davis, I just wanted to speak briefly to law and just kind of lay out the opening.

THE COURT: Sure. All right.

MS. GREENBERG: Your Honor, I have three witnesses here today. I have Susan Dunigan who will testify that she was excluded. I have Iris Weaver who will testify she was excluded. These are to establish that that courtroom was closed for jury selection, and that people were excluded. It's not necessary for me to show that it was a judicial act. It can be an act by a court officer.

THE COURT: No, no. That's what I mean. Yes. By extension. [7]

MS. GREENBERG: Right. And then I have Mr. Davis who will testify as to the absence of waiver, which is the second thing that I need to show. So I'm going to call Mr. Davis first because he has somewhere he needs to go.

THE COURT: Okay.

WILLIE DAVIS, SWORN.

THE COURT: Good afternoon, Mr. Davis.

THE WITNESS: Good afternoon, Your Honor.

THE COURT: Counsel, you may proceed.

MS. GREENBERG: Thank you, Judge.

DIRECT EXAMINATION BY MS. GREENBERG:

Q: Mr. Davis, were you trial counsel for Mr. Weaver in this case?

A: Yes, I was.

Q: At the time the case was tried, were you aware that Mr. Weaver had the right to have the public present during his jury selection? [8]

A: I was not aware.

Q: And you never discussed this question with Mr. Weaver?

A: Never had such a conversation with Mr. Weaver.

Q: And you had no strategic reason to keep the public out.

A: I had no reason whatsoever.

Q: And if you had known the public was allowed in, you would have made sure they could be here?

A: If I had known that the public had a right to be here, I would have insisted or at least discussed it with the defendant as to whether or not he wished to have them here.

Q: But there was no discussion?

A: There was no discussion.

Q: Thank you.

MS. GREENBERG: Judge, that's all I have.

THE COURT: Mr. Pappas.

CROSS-EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, sir. [9]

A: Good afternoon.

Q: Obviously, we're talking about Commonwealth versus Kentel Weaver. Do you remember what year the case was tried in, sir?

A: No, I do not.

Q: If I were to say it was tried in April of 2006, would that ring a bell?

A: It would not ring a bell, but I will accept that.

Q: And as far as the questions that counsel asked you about, do you remember the trial itself?

A: Yes, I do.

Q: Okay. And do you remember how long it took to pick a jury in this case?

A: No, I do not.

Q: Do you remember what courtroom it started in?

A: I can only tell you it was either on the eighth or the ninth floor, but I have no recollection of which courtroom.

Q: Do you recall whether or not jury selection took more than a day, sir?

A: No, I do not. [10]

Q: And if I were to tell you that jury selection spanned two days from Friday, April 7th, into Monday, April 10th, would that refresh your memory at all?

A: No, it would not.

Q: And you have a recollection of who the case was tried in front of?

A: I—I'm not sure. I've been talking with counsel for the defendant now, and she tells me it was Judge Neel, but—I think, but I don't have an independent recollection that it was Judge Neel.

Q: You're familiar with the—with the courtrooms in this courthouse.

A: Oh, yes.

Q: You've tried a lot of cases?

A: Oh, yes.

Q: And are you familiar with the courtrooms on the tenth and ninth floor here?

A: On the ninth, not the tenth.

Q: Okay. The ninth floor, fair to say that the courtrooms are approximately the same size as the courtroom we're in right now?

A: Well, if I'm not mistaken, I think [11] maybe on the ninth floor one—a couple may be larger.

Q: Do you have any memory—fair to say that you don't have a memory of whether or not the courtroom was locked? To your memory was it locked at all?

A: No. Not on this case, no, I don't.

Q: You don't have any memory of that?

A: I don't have any memory of the courtroom being locked, no.

Q: Okay. You were aware and had some extensive contact with your client's mother, Iris Weaver, leading up to and including during the time of the trial of this case?

A: Up to the trial. I don't think I had very much contact during the trial.

Q: Were you aware—did you know of a woman who was providing pastoral support in the name of Susan Dunigan? Did you meet her?

A: Yes, I did. I believe—Major Dunigan I believe it is.

Q: Yes.

A: From the Salvation Army?

Q: Yes. [12]

A: Yes, I do.

Q: Okay.

A: I don't know if I would recognize if she walked in the door unless she had on a uniform, but I remember her.

Q: And do you remember her being present at a motion to suppress statements that was litigated in front Her Honor, Judge Hines?

A: That went over a period of time. I'm pretty sure she was, yes.

Q: Okay. As far as the beginning of the trial of this particular case in April of 2006, at any point did Iris Weaver come up to you during jury selection and tell you she was not allowed into the courtroom?

A: I have no recollection of that.

Q: Okay. At any time did Susan Dunigan come up to you during the jury selection period of this case and tell you she was not allowed into the courtroom?

A: I have no recollection of that.

Q: Are you aware of another family member, an individual by the name of Paul Smith? [13]

A: I believe—yes. Yes, I do. I remember him.

Q: Okay. And was he present intermittently during the trial?

A: I don't know.

Q: Do you have any memory of him coming up to you and telling you he was not allowed into the courtroom?

A: I have no such memory.

Q: So you have no memory at all of any of those three people, Iris Weaver, Susan Dunigan, or Paul Smith, telling you during jury selection that they were not allowed into the courtroom?

A: No, I do not.

Q: Now you knew that they were present, correct?

A: Well, I knew they were present when we started taking evidence. Yes.

Q: Okay. And in fact, do you recall drafting a motion in limine asking certain family members of your client to be exempt from the sequestration order?

A: I do that routinely, so yes. I do [14] that automatically if a family member is going to be a witness, especially a parent, I draft a motion asking that they be excluded from the sequestration order.

Q: And you drafted a—did you draft such a motion in this particular case?

A: I believe I did, yes.

Q: And you knew that understanding that Iris Weaver was likely to be a critical witness in the case itself—

A: Oh, she would be essential, yes.

Q: Essential. Okay. And I just want toshow you, this is an unsigned copy of a pleading. Do you recognize that pleading, sir?

A: This is something that I would normally file in the event that a family member was going to be a witness for the defense or going to be a witness the prosecution. I would ask that they be exempted from the order of sequestration because I had filed a motion for sequestration myself.

Q: Okay. And does this look like the motion you filed in this particular case?

A: All I can tell you is that's the [15] motion—that's the type of motion that I would have filed.

Q: Okay.

A: Whether or not the language is the same, I can't tell you.

Q: Well, just looking at this particular caption "Commonwealth versus Kentel Weaver," and then it addresses the name "Iris Weaver"—

A: Iris Weaver.

Q: —you would agree with that?

A: I would agree with that, yes.

MR. PAPPAS: Your Honor, for purposes of this hearing, may this be marked as the next exhibit?

THE COURT: Exhibit 2. (Exhibit Number 2 marked; Sequestration motion in limine re: Iris Weaver.)

Q: So fair to say that given the nature of the evidence in this particular case, the relationship of Mrs. Weaver to her son, Major Susan Dunigan in support of Mrs. Weaver, you [16] certainly contemplated before the trial started that family support is necessary for the defendant at trial, correct? You contemplated it before trial.

A: I don't really know how to answer that. That's always important. Family is important. It's always important. So not just this trial, but all trials.

Q: All trials.

A: Yes.

Q: So like you said, that would be something that you would routinely do—

A: Yes.

Q: —in every trial.

A: Oh, yes.

Q: And this case was no different, correct?

A: No different.

Q: Okay. Now understanding that that's something you routinely did, I'm just looking at your affidavit where it says, "At no time did I discuss with the defendant to have the support of his family and friends in the courtroom." [17]

A: During jury selection, no.

Q: Okay. And you said that you never discussed that with your client, correct?

A: No, I never did.

Q: And—

A: Not prior to the jury being impaneled and proceedings getting started, that is, the testimony.

Q: And if you knew that, that they had a right to be present, you certainly would have raised it.

A: I'm sorry?

Q: You said on direct that if you knew they had a right to be present, you certainly would have raised it.

A: I didn't say that.

Q: Well, maybe you can correct me.

A: I never said that. If you're asking me now would I, the answer is yes.

Q: Okay. But back then were you aware that the public had a right to be present?

A: No.

Q: Okay. And so what I'm asking you in followup to that is if you had known it back [18] then would you have raised it?

A: If I had known that the jury—I mean, that the public had a right—the defendant rather had a right for the public to be present during jury impanelment, I certainly would have raised the issue with the trial judge.

Q: Okay. Now you've been a trial attorney—

A: Fifty years.

Q: Longer than I've been alive.

A: Yes. Longer than you've been alive, yes.

Q: And you've tried—

A: That's not casting aspersions on you though, Mr. Pappas.

Q: Thank you, Mr. Davis. Now understanding that you've tried many, many, many cases in the trial courts in this Commonwealth, correct?

A: That's correct.

Q: And fair to say that you've handled a number of cases over the years in the appeals court, both in front of the Massachusetts [19] appeals court here and the Supreme Judicial Court.

A: Not—I don't want to appear braggadocios, but I don't think anybody practicing now has been there more than me.

Q: Okay. Do you remember a case—now understanding that this case was tried in 2006, Commonwealth versus Kentel Weaver, do you remember a case back—that was decided in 1996, *Commonwealth versus Bentry Gordon*?

A: Absolutely.

Q: Do you remember that case?

A: I certainly do.

Q: Okay. And do you recall that's a case that you were actually the trial attorney.

A: I was one of them. There were five different—defendants in that case.

Q: And on this particular case, at least with respect to some of the attorneys on appeal, you followed the case up on appeal?

A: I was allowed to do that, yes.

Q: Okay.

A: That was prior to the CPCS rule concerning trial counsel not handling the [20] appeal.

Q: And that case was decided—would you agree with me that it was decided in 1996?

A: There are two *Gordon* cases in the SJC. I don't know the date or—which was first, but one was pretrial and the other was post- trial.

Q: I'm just going to show you this document—excuse me one second. I'm going to show you this document, sir. Just directing your attention to the top where it says, "*Commonwealth versus Bentry Gordon.*"

A: "Sean Lee, Bentry Gordon, Ronald Settles," yes.

Q: Okay. And you would agree with me that this was decided in June of 1996?

A: Yes, it was.

Q: And you recall being appellate counsel on that particular case?

A: I was appellate counsel for Bentry Gordon.

Q: And do you recall one of the issues being decided in that case—or one of the issues addressed in that case was that the [21] rights of a defendant to a public trial? Do you recall that, sir?

A: No.

Q: Including specifically members of the defendant's family—

A: No, I do not

Q: —that that issue was addressed?

A: No. I don't have a memory of knowing about it at that time. I have read it since because I have cited it in a couple of cases within the last year or two.

Q: Okay. And having read it since, are you talking about since 2006 or prior to 2006?

A: Well, actually it has been since 2006 my recollection of running across the case doing research was actually a little more than a year ago when I was doing a case up in Essex County.

Q: So part of being, you know, a successful attorney like yourself, Mr. Davis, when a case goes up to the Supreme Judicial Court and is argued, is it fair to say that you would have an interest in reading the decision once it comes down? [22]

A: Not all the time. I—no. There's no way—I can't sit here and say that I would read every case that comes down from the SJC. Not even every criminal case.

Q: Not every case. I'm talking about just the ones that you yourself argue and appear on on behalf of the client to the Supreme Judicial Court.

A: And actually, I can't say yes to that either for the simple reason that quite often cases go up, you know what the result is going to be. You take the case up because you're obligated to do so. And you know, you might scan it after when you see that it has been affirmed, but you don't necessarily read the whole case.

Q: So is your answer for purposes of this hearing that as it relates to the issue of courtroom closure and the right to a public trial being violated, you weren't aware of that issue prior to 2006?

A: May I explain?

Q: Certainly.

A: I did not raise the issue. As I said, [23] there were five lawyers in that case. I have asked around since this case came up who did it, and I believe it was Bob Sheketoff. He raised the issue. It was not written—the issue was not briefed by me. It was briefed by Bob Sheketoff. I did not read his brief in advance. I read mine, and that certainly was not an issue I raised in mine. So it was Bob Sheketoff's issue that—where he raised the issue about closure of the courtroom.

Q: And did you review the decision in the *Bentry Gordon* case prior to testifying today?

A: I reviewed that about—no, I didn't. I did about a year ago when I was preparing a motion for a new trial up in Essex County.

Q: Okay. At any rate, neither Ms. Dunigan nor Mrs. Weaver approached you and gave you any information saying that they had been excluded from the courtroom?

A: I have no recollection of that.

Q: Okay. And that would have been at the time the trial commenced during jury selection.

A: I have no recollection of them approaching me. [24]

Q: And fair to say you knew exactly who those two women were as you testified?

A: Of course. Of course.

Q: Okay. As what point did you find out?

A: Find out what?

Q: That they had been excluded.

A: When they—I was called I believe by present counsel and asked about it.

Q: And how did that take place?

A: She was appointed to do the appeal, and she opted to do a motion for a new trial raising this issue. And naturally she called me to see if I was aware of it, and I was not aware of it.

Q: And fair to say that your affidavit doesn't state anything about either Mrs. Weaver or Susan Dunigan approaching you and saying they had been excluded, correct?

A: I don't know. I haven't—I gave the affidavit, but that was a few weeks ago. I don't know what it said. Would you show it to me, please.

Q: (Counsel complies.) Do you recall the affidavit now, sir? [25]

A: Yes.

Q: So there is nothing in here about you having any memory whatsoever or a lack of memory about

either Mrs. Weaver or Ms. Dunigan approaching you on that issue, the courtroom-closure issue.

A: That's not why I was asked to give the affidavit. So no. It's not in there.

MR. PAPPAS: And just for purposes of the record, Your Honor, at least as it relates to this particular portion of the hiring, I would like to make a record that the defendant is waiving his right to attorney-client privilege relative to the next questions I'm going to ask about waiver.

MS. GREENBERG: Judge, if we can go through the waiver questions one at a time to see if he has an objection, Judge.

THE COURT: Did you all discuss this before now?

MS. GREENBERG: Judge, we had a motion hearing on it, and we agreed the Commonwealth would ask questions, and I would object if I needed to. [26]

THE COURT: Go ahead, Mr. Pappas.

Q: At any time during the trial did you have a discussion with your client about the courtroom being closed?

A: I don't have any recollection of having any discussion with Mr. Weaver at the beginning of the trial or any time during the trial about the courtroom being closed.

Q: So fair to say based on your testimony today that's because you didn't have a reason to?

A: What do you mean?

Q: No one approached you about the courtroom being closed, or not being allowed into the courtroom.

A: No. Nobody approached me that I remember.

Q: And I should make that distinction. And to your knowledge, as you testified earlier, you said that to your knowledge the courtroom wasn't closed, correct?

A: I didn't know whether it was closed or not. I can tell you what was the routine at that time and for the last—up until a couple [27] of years ago, it was routine that—especially in murder cases when they had a lot of jurors in a small courtroom that the courtroom would be closed until the jury selection process was completed, and then the public would be allowed back into the courtroom, or an alternative, which I have been involved in occasionally, jurors—individual voir dire were being conducted in the lobby. That has happened a couple of times too.

Q: Mr. Davis, at any point in time did you discuss any of the motions in limine that you filed on behalf of your client? Did you discuss those with Mr. Weaver?

MS. GREENBERG: I'm going to object here.

A: I don't remember what I discussed—

THE COURT: The objection is overruled.

A: I don't remember what I discussed with Mr. Weaver pertaining to a particular motion in limine. I don't. Which one are you taking about?

Q: The one that would be most relevant, [28] and that would be the motion to exempt certain family members from the sequestration order.

A: Well, I'm pretty sure I told him that I would seek to have his mother and Mr.—I believe Mr. Smith it was. Was it Mr. Smith? Permitted to be in the courtroom while other testimony was being given

considering the fact that I believed both were going to be witnesses for the Commonwealth.

Q: Okay. So not—I just want to be clear for purpose of this hearing. Are you making a distinction between the trial and jury selection?

A: Yes.

Q: So—did you specifically explain to him that you were making that motion in limine to exempt family from the sequestration order just at it related to the trial?

A: Just as it related to the trial. In other words, I thought it important that his mother - especially his mother - hear the testimony coming from the witnesses against her son.

Q: Okay. And you didn't think it would [29] be important to have them in there for jury selection?

A: No, I did not.

Q: And is that—

A: It never crossed my mind.

Q: Is that based on your understanding of past practice and what you were particularly familiar with during jury selection in murder cases?

A: Absolutely. I can tell you this without fear of contradiction. At that time, in that era, there were very few trials, if any, where the public was in the courtroom, especially when the courtroom was crowded.

Q: And again, at no point did either Mrs. Weaver, Ms. Dunigan or Mr. Smith come to you and tell

you that they were not allowed in the courtroom during jury selection?

A: I have no recollection of either one of those people approaching me to tell me that they were not allowed in the courtroom.

Q: Thank you, Mr. Davis.

MR. PAPPAS: That's all I have.

THE COURT: Any redirect? [30]

REDIRECT EXAMINATION BY MS. GREENBERG:

Q: Mr. Davis, this was decided in June of 1996; is that correct? Just for the record.

A: According to here, it was decided June 10th of 1996.

Q: And this trial was in April of 1996, so before this decision.

THE COURT: Which trial?

MS. GREENBERG: Mr. Weaver's trial.

THE COURT: No, no.

MS. GREENBERG: No. It was after.

THE COURT: Yes.

MS. GREENBERG: All right.

Q: And you were not trial counsel?

A: Yes, I was trial counsel.

Q: You were trial counsel, but you were for Mr. Gordon.

A: I was for Mr. Gordon. And as I said, there were five defendants in that case, and I think of the five, four—one was acquitted, and four went up on

appeal, and I represented Mr. Gordon on appeal. And the issue, as I have—as I explained to Mr. Pappas about the jury—courtroom closure during jury selection, I [31] believe was raised by Bob Sheketoff, and it had not—it did not concern jury selection for the trial. It concerned something else as I recall.

Q: Okay. Thank you.

A: And I'm only recalling now because I—you know, I read it in preparation for coming here.

Q: Okay. Thank you.

MS. GREENBERG: Thank you, Judge.

RECROSS-EXAMINATION BY MR. PAPPAS:

Q: At the SJC argument for Bentry Gordon, you were one of five attorneys present?

A: One of four, and the—it was not brought up at oral argument. That was one of those that was in the brief, but I don't have any recollection of either lawyer for the defense or the prosecution making an oral argument to that effect. We had too many issues and so little time for argument, so I'm pretty sure about that.

MR. PAPPAS: That's all I have, Your Honor. [32]

THE COURT: You may step down, Mr. Davis.

THE WITNESS: Thank you.

THE COURT: Ms. Greenberg.

MS. GREENBERG: Judge, can I just ask Major Dunigan to come in?

THE COURT: Well, the court officer will do that for you.

MS. GREENBERG: Great. Thank you. Major Susan Dunigan from the Salvation Army.

SUSAN DUNIGAN, SWORN.

THE COURT: Good afternoon.

THE WITNESS: Good afternoon, Judge.

THE COURT: You may proceed, counsel.

MS. GREENBERG: Thank you, Judge.

DIRECT EXAMINATION BY MS. GREENBERG:

Q: Major Dunigan, can you state and spell your name for the record.

A: Major Susan Dunigan, D-U-N-I-G-A-N.

Q: And can you tell the Court and state for the record what is that uniform that you're [33] wearing?

A: I wear the uniform of a Salvation Army officer. I am ordained and administrate the Salvation Army kroc center neighborhood outreach in Camden, New Jersey. I've gone through two years of Salvation Army training school and have been ordained and run Salvation Army programming for twenty-seven years.

Q: And can you tell us if you know Iris Weaver?

A: I do know Iris Weaver.

Q: And can you tell us how you came to know her?

A: Iris Weaver was a member of the Salvation Army Jubilee House at 10 Melville Avenue, Dorchester, Massachusetts, and continues to be so, so I have known her for approximately thirteen years.

Q: Did you come to the two days of jury selection in Kentel Weaver's trial?

A: I came Mrs. Weaver those days.

THE COURT: Could you speak up a little bit, Ms. Greenberg. The wind I howling out there. [34]

Q: And what happened when you came?

A: I attended every day with Mrs. Weaver as her pastoral support. We came very early in the morning, first thing, and we were told to sit in the hallway.

Q: This was the first day of jury selection?

A: Friday and Monday as well.

Q: So on the Friday, when you go there were you early or late? When did you get here?

A: Because Iris comes usually first thing in the morning, I would meet her here. Eight years ago I can't approximately remember. Nine o'clock. She was always here before I was, and we were waiting in the lobby.

Q: By "the lobby," what do you mean?

A: Outside the courtroom doors, in the hallway on the bench.

Q: And were the courtroom doors locked when you came here? When you came in because it was early?

A: Yes. I think so.

Q: And what would happen when you tried to go—what happened that Friday when you [35] tried to go in?

A: Well, we really just asked what are we supposed to do now, now being familiar with court

proceeding, and they said: You need to wait right here in the hallway.

Q: And then what happened?

A: And then the jurors filed past into the courtroom, and we were told to wait, continue to wait, there and not to talk to the jurors and not to say anything else. I was praying with Mrs. Weaver at the time.

Q: And were you allowed to go into the courtroom with the jurors?

A: No, we were not.

Q: What were you told?

A: To wait in the hallway.

Q: Until when?

A: Until someone told us to come in.

Q: And then what happened?

A: So we just continued to wait, and then I asked why we were waiting, and it was because the potential opening statements that the court could proceed, and so we didn't go home, and then because there were so many jurors at the [36] time, we—it was closed, and then we came back the next day, the next week, on Monday, and the same process happened.

Q: So—

A: Which we thought was what we were supposed to do.

Q: So were you told you could not come in until the jury selection was complete?

A: To my best recollection, yes. We were waiting until that process was complete for opening arguments.

Q: And the person in the courtroom that told you that, what—was it a court officer? Like what were they wearing? Describe that.

A: They—to my best recollection it was a court officer in uniform, but I can't—it was over eight years—it was approximately eight years ago, and I do not recall if it was a member of the DA's office or if it was a court officer. I cannot recall exactly.

Q: Do you recall the outfit? A uniform?

A: I know we had lots of conversations. The trial was very extensive, so we had many conversations with court officers, such as are [37] seated in the courtroom today.

Q: That outfit?

A: Yes.

Q: The outfit that the gentleman sitting over here is wearing?

A: Yes.

Q: Did you get to see any of the jury selection?

A: No.

Q: Were you there both jury selection days?

A: Yes.

MS. GREENBERG: I have no further questions, Judge. Thank you.

THE COURT: Mr. Pappas.

CROSS-EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, ma'am.

A: Good afternoon.

Q: Major, I'm in receipt of a document, a letter, written to a Ruth Greenberg, Attorney at Law, 505 Paradise Ave., Swampscott, and I just want to show you this document. Do you recognize it? [38]

A: Yes, I do.

Q: And you prepared this document, it's a photocopy?

A: Yes, it is.

Q: And this particular document, ma'am, do you remember when you generated it? What was the date of it?

A: No. I don't remember offhand. It was approximately in—I'm thinking January, but it might have been—no. It was earlier.

Q: January of what year?

A: Of this year I think.

Q: 2012?

A: Yes. I cannot remember. I know it was either in the fall—I don't know because we were waiting—no. I don't know. It was either in the fall or in January. I'm not sure.

Q: Can you narrow it down to the year?

A: 2011.

Q: 2011.

A: I would say the fall of 2011. I can't remember when the lawyer first contacted me.

Q: Okay. So this was generated after you [39] were contacted by Ms. Greenberg?

A: Yes.

Q: Okay. And before you prepared this letter that you signed under the pains and penalties of perjury, did you have any conversation with Iris Weaver before you drafted this letter?

A: No, I did not.

Q: Okay. And what was the extent of the conversation that you had with Ms. Greenberg before you drafted this letter?

A: From her phone call?

Q: Correct.

A: She told me that she was Kentel Weaver's attorney, and that she would like to talk to me regarding the proceedings of Kentel Weaver's trial and my responsibility as pastoral support for Iris Weaver.

Q: Okay. And how did the—how was the subject of the courtroom—you're not being allowed access to the courtroom, how was that initiated?

A: She asked me at length to describe the weeks that we spent here in this courtroom–[40] this court building and what actually happened during those weeks.

Q: Okay. I don't want to cut you off, but I want to direct your attention as it relates this hearing so that we can focus. I want you to focus on the jury selection that you just testified on direct examination, the first two days, that Friday and that Monday.

A: Correct.

Q: How was that initiated during your conversation with Ms. Greenberg?

A: She asked us did we participate in the jury selection.

Q: Okay. Now this was some—fair to say some five-plus years after the actual trial happened in 2006?

A: Correct.

Q: And did you have a specific recollection at that point that some person or some persons told you couldn't go into the courtroom?

A: Correct.

Q: Do you have a specific recollection of who that person was? [41]

A: No.

Q: Now you said on direct that to the best of your recollection you thought it was a court officer?

A: Yes, sir. But as you know in my letter, I said it could have possibly been somebody from your office.

Q: Okay. And just so we're clear, by "a court officer," you're talking about uniform personnel, similar to the two gentlemen to my right—

A: Correct.

Q: —that are wearing white shirts, long-sleeve shirts, with dark blue pants?

A: Correct.

Q: Those would be the court officers.

A: Correct.

Q: And who would you be referring to when you talk about an assistant to the DA?

A: The young man who is currently sitting in the hallway with glasses.

Q: Okay. Do you know his name?

A: No, I do not.

Q: And it's your testimony that it was [42] either that person, who is outside in the hallway that you recognize as working in the DA's office, or a court officer, a court officer who said you couldn't go into the courtroom.

A: Correct.

Q: And did that happen on one or both days of jury selection?

A: Both occasions.

Q: Do you have a specific recollection that jury selection took two days?

A: Yes, I do.

Q: Okay. On two different floors in this courthouse?

A: Yes, I do.

Q: And fair to say you would agree with me that those courtrooms where the jury selection and the ultimate trial took place were fairly small courtrooms?

A: Yes, sir.

Q: As far as the gallery goes.

A: Yes, sir.

Q: And would you agree with me that the size of those courtrooms where jury selection [43] started

on Friday, April 7th, and they concluded on Monday, April 10th, were about the size of the courtroom we are in right now?

A: I'm not sure.

Q: As far as the gallery goes.

A: Approximately. I cannot say that for sure.

Q: Okay. Now just going back in time a little bit, Major Dunigan, prior to the trial, fair to say that you provided pastoral support to Mrs. Weaver even before her son, Kentel, got involved in this incident?

A: Correct.

Q: Okay. So if I were to tell you that this particular—the matter that he was tried for, the murder of Jermaine Rutger (phonetic), occurred in August of 2003, you've had a relationship with Iris Weaver prior to that date?

A: Correct.

Q: For how many years, ma'am?

A: Approximately six years prior.

Q: Six years prior. So roughly in about 1997— [44]

A: Yes.

Q: —when you first knew her?

A: Correct.

Q: And did you become aware—shortly after the incident involving Jermaine Rutger and then ultimately the charges being brought against Kentel Weaver, you became aware of that case?

A: Correct.

Q: During the pendency of Kentel Weaver's case, and in fact, preceding that, let me ask you—strike that. I'll ask a better question. During the time that you knew Mrs. Weaver, starting in 1997, you knew that she had another son, Kassine Weaver (phonetic)?

A: Correct.

Q: And you knew Kentel, Kassine, Iris Weaver, Paul Smith, you knew the whole family for a number of years?

A: Correct.

Q: How would you describe your relationship with them, ma'am?

A: I was for thirteen years Iris Weaver's [45] pastor.

Q: And you knew that her son, Kentel, was being charged, and the circumstances under which he was charged was a difficult time for her, a very difficult time for her emotionally, correct?

A: Correct.

Q: And you did your level best during that entire time to offer her any support that you could?

A: Correct

Q: And you continue to do that to this day?

A: I've been transferred to Camden, New Jersey—

Q: As best you can,—

A: Yes.

Q: —given your current location.

A: Correct.

Q: You have maintained a relationship with her?

A: We exchange Christmas cards.

Q: Okay. Occasional phone calls?

A: She does not initiate the phone calls [46] because—but I have family who live in the area, and occasionally I will stop by Burger King to say hello.

Q: And she was working at Burger King back when this happened in 2003?

A: Correct.

Q: And fair to say that when this happened and to this day, you would do whatever you could to help her, correct?

A: Within the bounds of moral integrity.

Q: Sure. Now getting back to the family. You're also aware during the pendency of Kentel's case that in 2004 her other son, Kassine, was the victim of a homicide, correct?

A: Correct.

Q: And you're aware that in 2006, April of 2006, Kentel's case went to trial, correct?

A: Correct.

Q: Were you present a couple of months later, in July of 2006, when the person alleged to have murdered Kassine Weaver when that case went to trial?

A: Correct.

Q: And that was just a couple of months [47] later, correct?

A: Correct.

Q: And just like you were with Iris Weaver during the entire trial of Kentel Weaver, you were also present with Mrs. Weaver for the entire trial for the person alleged to have murdered Kassine Weaver?

A: I cannot guarantee that I was with Mrs. Weaver the entire trial for Kassine's murder, reason being is that she had a victim-witness advocate who was supporting her. The reason I was with her for Kentel's trial was Kentel was also a member of our church, and she was all alone and did not have a lot of support. So I cannot verify that I was with her throughout the whole trial for Kassine's murder trial.

Q: Okay. And that resulted in a conviction as well?

A: Correct.

Q: And that also was prosecuted—that case was also tried in this very courthouse?

A: Correct.

Q: No one—you have no memory of anyone [48] in that particular trial—strike that. Let me ask this. Were you present during jury selection for that case?

A: I do not know.

Q: Okay. Do you know if Mrs. Weaver was present during jury selection?

A: I do not know.

Q: Now as it relates to Kentel's trial, fair to say that on the first day of jury selection a large number of jurors were brought up?

A: Correct.

Q: You were out in the hallway?

A: Correct.

Q: Would you agree with me that the courtroom was filled to capacity with prospective jurors?

A: I do not know. I was not in the courtroom.

Q: Okay. And do you know if the courtroom was locked or not?

A: I do not know. I know when we came in the morning it was locked. [49]

Q: Okay. And when you say when you came in the morning that it was locked, that would be before court officially began?

A: Correct.

Q: Okay. Did you ever see the court officers locking and unlocking the doors?

A: No, I did not.

Q: Okay. Do you have a recollection of how many court officers were there on the first two days?

A: No, I do not.

Q: Okay. Do you have a recollection—so today you don't have a recollection whether it was a court officer or a representative from the Suffolk County District Attorney's Office who told you not to go in.

A: Correct.

Q: That you couldn't go in?

A: Yes. But I do have a recollection—it was one. Someone actually did say those things.

Q: So either a court officer or—

A: Correct.

Q: —someone from the DA's office. [50]

A: Yes, sir.

Q: And that person you identified as being out in the hallway today?

A: Possibly. We had several interchanges with that young man.

Q: Okay. Now

A: May I speak?

Q: There's no question before you.

THE COURT: No. You have to wait for a question.

THE WITNESS: Oh, I have to wait until he asks a question. I just had a thought, but okay.

Q: Now whether or not you know whether it was that individual who is out in the hallway from the district attorney's office, was it always the same person who told you that you couldn't go into the courtroom?

A: I do not have a recollection.

Q: Okay.

A: But we were told both days to stay.

Q: So either on day one or day two, it was someone who told you you couldn't go into the courtroom. [51]

A: Correct.

Q: And were you always with Mrs. Weaver?

A: Yes, I was.

Q: And when—I asked you about that someone, whether you're sure it was—whether you can be sure it was the same person or not, is there anyone else that you recognize from the district attorney's office who may have told you that you couldn't go into the courtroom?

A: You and that young man are the only ones that I recognize, facial recognition.

Q: Okay. And it certainly wasn't me who told you you couldn't go into the courtroom.

A: I do not have that recollection.

Q: Okay. Well, do you remember having any contact with me instead of—strike that. Do you remember having any contact with me beyond a "good morning" or an acknowledgment by way of a nod, any type of conversation between the two of us?

A: Throughout the whole court? Throughout the—

Q: Jury selection. [52]

A: Just jury selection. No, sir.

Q: Thank you. Did you have any contact—do you remember who Sergeant O'Leary was?

A: Yes, I do.

Q: And Detective McLaughlin?

A: Yes, I do.

Q: Okay. Did they ever—either one of those individuals on either day, Friday, April 7th, or Monday, April 10th, tell you you couldn't go into the courtroom?

A: Not to my recollection.

Q: Not to your recollection. But a moment ago you just said it was either a court officer or someone from the DA's office. So can we exclude the two detectives, Sergeant O'Leary and Detective McLaughlin?

A: Yes. It was not a Boston police officer.

Q: Okay. So we're talking about two distinct possibilities.

A: Right.

Q: And when you asked why you couldn't go in, what was the answer that was given to you?

A: I don't know if I questioned why we [53] could not go in. I assume not being familiar with judicial and court protocol that it was the rule that we were not to go in.

Q: Okay. So you never asked why?

A: No, I did not.

Q: We're clear on that. You never asked anybody why you couldn't go in.

A: I was assuming I was obeying the rules.

Q: Okay. All right. So you weren't told that you could come in—not come in until jury selection was complete or were you told that?

A: We were told we could not come in and wait in the hallway.

Q: Okay. And on both days you were here with Mrs. Weaver early in the morning?

A: Correct.

Q: And fair to say that when Friday ended you went home. You came back on Monday. Again, there were a large number of jurors?

A: Yes.

Q: Fair to say that you were out in the hallway? [54]

A: Yes.

Q: Is it also fair to say that there were jurors out in the hallway as well?

A: Yes.

Q: And do you have a recollection, ma'am, of people coming in, prospective jurors coming in, and out of the courtroom? Meaning jurors who were leaving, and then other jurors who were going in as the jury selection process was unfolding?

A: Yes.

Q: Okay. Do you have a recollection of seeing a court officer having to lock or unlock the doors for a juror, prospective juror, to be allowed access into the courtroom?

A: Not to my knowledge.

Q: And fair to say, ma'am,—I'll ask you this. Do you have a recollection of the actual doors to the courtroom being left open so that the jurors, prospective jurors, could just walk in?

A: No, I do not. I remember the court officer would open the door, and then a line of the jurors came in, and then the door was [55] closed.

Q: Okay. If you can answer this question, Major Dunigan, from time to time did you see—were you able to see the courtroom doors? You just testified that you saw a court officer opening and closing a

door whenever a prospective juror had to be allowed in?

A: Restate the question.

Q: Fair to say that you were seated in a position where you could see the court officer opening the door from time to time to let a prospective juror into the courtroom?

A: Yes. We were sitting on the benches in the hallway directly outside the courtroom.

Q: Okay. Fair to say that you never saw any type of sign on any courtroom door saying "Do not enter."

A: No. It was only a verbal.

Q: Okay. So there was never any—there was never any sign posted?

A: No.

Q: Okay. And are you aware—do you have any memory of telling Mr. Davis that you were not allowed entry into the courtroom? Did [56] you ever bring it to his attention?

A: I—not to my recollection. We thought that was just the rule, that we weren't allowed in. We were sitting on very hard benches for a very long time.

Q: So on day one when jury selection started towards the end of the day you didn't tell Mr. Davis anything at the end of that day when the jury was sent home and the proceedings were continued until Monday?

A: Conversation was just to: How is it going? When—are they—have they picked the jury? It was more conversation on when will he begin. He told us

that we would have come back on Monday for the possibility of opening arguments.

Q: Okay. And you're aware—do you have a memory that the jury—a full jury was seated that Monday, April 10th? If you do, ma'am.

A: I am not aware of it. I think it was, but I'm not aware if it was seated that Monday or the following day. [57]

Q: Okay. And do you—did you ever bring it to Mr. Davis' attention on Monday, April 10th, that someone told you you couldn't go into the courtroom?

A: Again, we thought we weren't supposed to, so we—we did not question the authority of the—whoever told us not to.

Q: So is the answer no?

A: No. Correct.

MR. PAPPAS: May I just have a moment, Your Honor?

THE COURT: Of course.

Q: At the end of the day on Friday, April 7th, ma'am, you saw Mr. Davis outside the courtroom?

A: To the best of my knowledge. I—again, eight years ago, trial lasting for a really long time, many, many conversations with Mr. Davis. But I know that we were told to come back again on Monday.

Q: Okay.

A: So I'm saying yes, but not one hundred percent sure.

Q: So is it fair to say that Mr. Davis—[58] that you were waiting in an area outside to speak—

A: The courtroom.

Q: —to Mr. Davis at the end of the day?

A: Correct.

Q: And you were with Mrs. Weaver.

A: Correct.

Q: And where were you in relation to the courtroom doors when you had this conversation with Mr. Davis?

A: I don't know exactly. All I remember is sitting, laying, standing, walking around the hallways for hours.

Q: Okay.

A: So it was outside the courtroom door.

Q: And by virtue of that conversation you knew—you certainly knew he was Kentel's attorney?

A: Correct.

Q: And he would have known of your presence at the court—

A: Correct.

Q: —that day on Friday?

A: Correct. [59]

Q: And you never brought it to his attention that someone told you, at least according to your affidavit, that you couldn't go into the courtroom.

A: Correct.

Q: Just backing it up to that Friday when court commenced, the first day of jury selection, did you see Mr. Davis at the beginning of the day?

A: I saw him enter the courtroom.

Q: Did you have any conversation with him?

A: Probably just a greeting.

Q: Some type of acknowledgment between the two of you?

A: Correct.

Q: Or the three of you?

A: Correct.

Q: During that entire time frame that you were at the courthouse, were you with Mrs. Weaver?

A: Yes, I was.

MR. PAPPAS: That's all I have right now, Your Honor. [60]

THE COURT: Any redirect, counsel?

MS. GREENBERG: No, Judge.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

THE COURT: I appreciate your patience, staying over the weekend. Thank you. Your next witness, counsel.

MS. GREENBERG: Iris Weaver, Judge.

THE COURT: Mr. Pappa, you brought your witnesses in today?

MR. PAPPAS: The three that I could, Your Honor.

THE COURT: I doubt if we're going to get to them today, all of them.

MR. PAPPAS: I hope we do, or Your Honor, maybe we could do two of them.

THE COURT: Okay.

MR. PAPPAS: If we have enough time.

THE COURT: All right.

MR. PAPPAS: Whatever the Court's pleasure.

THE COURT: Yes.

IRIS WEAVER, SWORN. [61]

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

DIRECT EXAMINATION BY MS. GREENBERG:

Q: Mrs. Weaver, can you say your full name for the record.

A: Iris Weaver.

Q: And are you related to Mr. Kentel Weaver who is here in the courtroom with us today?

A: Yes. I'm his mother.

Q: Did you come to this courthouse for the jury selection for the murder trial of this case?

A: No. I didn't. I came, but I didn't get in.

Q: Did you come to the courthouse?

A: Yes, I did. I'm sorry.

Q: What happened?

A: The—it was either a lady or a man, I believe it was a woman. And I was sitting outside; and

when I went to come inside, she said that it was closed for jury selection. And so we waited—I sat outside and waited [62] for the rest of the people to come.

Q: There were two days of jury selection in this case. Did that happen both the days?

A: That's correct.

MS. GREENBERG: I have no further questions.

THE COURT: Okay.

CROSS-EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, ma'am.

A: Good afternoon.

Q: How are you?

A: Good. Thank you.

Q: Mrs. Weaver, do you have a memory that the jury selection in your son's case took two days?

A: Yes.

Q: Okay. Do you have a—this was in 2006?

A: I can't remember the year.

Q: Irrespective of the year, 2006, was it the same woman who told you you couldn't go into the courtroom until the jury was picked?

A: I'm not for sure if it was a woman or [63] a man. I know it was one of the people in a white shirt, like the clerks.

Q: Okay. And I—"a white shirt, like the clerks," are you referring, ma'am, to the uniform similar to the gentleman I'm pointing to, the court officer,

wearing a long-sleeve white shirt with a badge, a tie and blue pants?

A: That's correct.

Q: Okay. So if I refer to the person how told you you couldn't get in as a court officer, would that be fair?

A: That's correct.

Q: Now was this on both days? Did this happen on both days?

A: That's correct.

Q: Okay. And was it a male or female court officer?

A: That told me? I'm not for sure of—male or female. I know it was an officer.

Q: Okay. Could it have been a male one day, and a female the second day?

A: It had to be a male or a woman, but it was an officer.

Q: Did you see a female court officer? [64]

A: That day—I can't remember if I seen a female officer on that date. Right now I can't remember.

Q: Okay.

A: I know it was an officer because that would be the only way I couldn't get into the room.

Q: Yes. And do you remember if the officer that you had the dealings with was white, black, Asian, Hispanic, any—

A: White.

Q: White. Okay. And definitely a court officer. You were with Major Dunigan the entire time?

A: Yes. She was here that day.

Q: She was there to offer you support?

A: Yes.

Q: And prior to the trial, did you have any contact with your son, Kentel, and let him know that you were going to be at the trial before it started? Did you visit him in jail?

A: I can't recall.

Q: Okay. Do you remember jury selection taking two days? [65]

A: Yes.

Q: And do you remember it taking place in two different courtrooms in this building?

A: I don't recall.

Q: Okay. Do you remember being out in the hallway and a lot of jurors coming upstairs?

A: Yes.

Q: Did you see Mr. Davis in the morning before jury selection started?

A: I don't know whether it was right before it started or during he course of it, but I did see him those days.

Q: Okay. Did you ever tell him either on Friday or on Monday that you were not allowed into the courtroom?

A: He knew this. He talked to us out there.

Q: Okay. So he knew you didn't get in.

A: Correct.

Q: Okay. You let him this?

A: He knew this.

Q: Okay.

A: He knew why we were sitting there [66] because he came into the courtroom, but we couldn't come in.

Q: And what I'm asking you, ma'am, just a follow up of that, Mrs. Weaver, did you tell him at some point either on Friday or on Monday that you weren't allowed into the courtroom?

A: No. I might have asked. I can't recall that I did.

Q: Okay. But he knew you were there.

A: Yes. He talked to me.

Q: And he knew you were out in the hallway?

A: Yes.

Q: And were you told just once on Friday and once on Monday during jury selection—and all these questions I'm asking you just have to do with that Friday and that Monday, ma'am. Were you told just once that you couldn't go in until the jury was picked?

A: No. Because when we went—I guess it was a break or lunch or whatever, and then when we came back, I tried to get in, and I still couldn't get back in.

Q: Okay. Did you ever ask to go back in? [67]

A: Yes.

Q: And did you ask a court officer?

A: Yes.

Q: And did you get the same response?

A: Correct.

Q: Okay. Fair to say that you never saw--were you seated—let me ask you this. Were you seated out in the hallway on one of those long wooden benches?

A: Correct.

Q: Did you see jurors going into the courtroom?

A: Yes.

Q: Periodically.

A: Yes.

Q: And that's as jury selection was unfolding?

A: Yes.

Q: And there were jurors outside in the hallway because they couldn't all fit in the courtroom. Do you remember that?

A: I couldn't tell who was for the jury and who was—because I didn't know what was going on in the room, so I don't know who the [68] people were.

Q: Right. Do you remember a lot of people being out in the hallway?

A: Correct.

Q: Did you ever see a sign on the courtroom door saying: Courtroom closed. Do not enter. Or anything to that effect?

A: I don't recall that.

Q: Okay. To your knowledge was the courtroom locked or were the people who were going into the courtroom just walking through the doors?

A: No. The courtroom was unlocked, but the clerk officer was standing at the door.

Q: Okay. Now when you say "clerk officer," we want to be clear. Are you talking about a clerk or are you talking about the court officer in the white shirt?

A: The court officer in the white shirt.

Q: So there was someone opening and closing the door.

A: No. You could open it; but when you open it, he would be there— [69]

Q: Okay.

A: —or she would be there. You would have to say. But they knew me.

Q: So when you—when you say "they knew me," you're talking about the court officers?

A: Yes.

Q: Okay. And when you say you could open the door, you're just talking about—if you were one of those prospective jurors, you could just turn the handle and open the door and go in if you were allowed to do so?

A: I don't know whether you turn a handle or just pull the door, but you could open the door.

Q: Okay. Now ma'am, how long had you known Major Dunigan prior to 2003? For how many years, months/years?

A: Prior? I don't know.

Q: Approximately.

A: A guess, say thirteen.

Q: Okay. Thirteen. So—

A: Thirteen years.

Q: So since about 1990?

A: Yes. [70]

Q: Okay.

A: Approximately. It was a long time.

Q: 2003 there was an incident that took place involving your son, Kentel?

A: Correct.

Q: And then that was about August of—August into September of 2003, then the following year in June 2004—you had another son, Kassine?

A: Correct.

Q: And he wound up being the victim of a homicide in June of 2004?

A: That's correct.

Q: That case was also handled by the Suffolk County District Attorney's Office?

A: That's correct.

Q: And there was a person charged in Kassine's homicide by the name of Rakeem Young (phonetic)?

A: That's correct.

Q: And that case was actually prosecuted in this very same courthouse just a couple of months after Kentel's trial had ended, the summer of 2006? [71]

A: Say that again. I'm sorry.

Q: The trial involving the person who killed Kentel Weaver, that person Rakeem Young, that trial started just a couple of months after Kentel's trial?

A: Probably. Close to it.

Q: Close to it. And in the course of that trial, did you ever have any contact with a victim-witness advocate from our office?

A: Yes.

Q: Do you remember who that person was?

A: I want to—for Kassime's case?

Q: Yes.

A: I want to say—I think a Mariella.

Q: Maricella Ramirez?

A: Correct.

Q: Okay. Now did you have any contact with Maricella Ramirez regarding Kentel's case?

A: No. I don't—not to my knowledge.

Q: Okay. And fair to say that she wasn't present because the roles were changed a little bit—

A: Right.

Q: —or a lot, I guess, in Kentel's [72] case.

A: Correct.

Q: And you knew what the role of the victim-witness advocate was based on your involvement in Kassine's case, correct?

A: Correct.

Q: Okay. Fair to say that you didn't have any contact with the victim-witness advocate from our office on Kentel's case? I hope I'm not confusing you, ma'am.

A: No. I—I believe I understood it, and I don't recall.

Q: Okay. So—because—

A: Oh. No.

Q: Okay.

A: Did I have a—

Q: Yes.

A: No.

Q: You understand because Kentel was actually the—

A: Right.

Q: —defendant—

A: Right.

Q: —in that case. [73]

A: Right.

Q: So those types of services would not be available to you in that particular type of case, Kentel's case.

A: Okay.

A: So what I'm asking is this. Is it fair to say that you didn't have any contact with a victim-witness advocate regarding Kentel's case during jury selection?

A: For Kentel's case. It's fair to say I don't recall for sure.

Q: Okay. So if I were to suggest to you, ma'am, could you be mistaken it wasn't a court officer, could it have been a victim-witness advocate who told you you couldn't come into the courtroom?

A: That was—no.

Q: No.

A: It was a court officer.

Q: It was a court officer.

A: Thank you.

Q: And that happened on one day or both days, Mrs. Weaver?

A: Both days. [74]

Q: Okay. Did it happen more than once on both days?

A: Yes.

Q: Do you have a recollection of the jury selection process starting late in the day on Friday, April 7th, 2006?

A: Starting late?

Q: Later in the day.

A: No.

Q: Did you see Mr. Davis after court recessed for the day on that Friday?

A: Yes.

Q: Did you tell him that you had not been allowed into the courtroom?

A: Yes.

Q: You told him.

A: Yes.

Q: Okay. So you made—were you with Major Dunigan when you made him aware of that?

A: I can't recall if she was beside me.

Q: And fair to say that when you made him aware of that, you also would have discussed things like how far you got in the jury selection process, possibly how it was [75] progressing? Were you curious?

A: Yes. But at that time you don't know enough about it.

Q: Understood. But you knew enough just to ask or tell Mr. Davis, your son's attorney, that you hadn't been allowed into the courtroom.

A: Yes, because he said we could come to court that day.

Q: Okay. Did you discuss prior to the case starting him filing some type of paper or him making a request of the Court that you be allowed to be in the courtroom during the trial? Did you discuss that prior to the case starting?

A: No.

Q: Let me ask it this way, back up a little bit, ma'am. Do you remember Judge Hines? Does she look familiar to you?

A: Yes.

Q: Okay. Do you remember testifying in a hearing some months prior, it may have been even a year prior to the trial, at a motion hearing that had to do with Kentel's [76] statements?

A: Yes.

Q: Okay. And did—Mr. Davis, leading up to the trial, did he let you know that you would also likely be testifying at the trial? That you would be a witness at the trial?

A: That I may be a witness at the trial.

Q: At the trial. Okay. Did you tell him that you wanted to be present during the trial?

A: Yes.

Q: Did you tell him that you wanted to be present during all phases of the trial?

A: Yes.

Q: Including selection of the jury?

A: Yes.

Q: And you made sure that you were in the courthouse on that day?

A: Yes.

Q: Okay. At the end of the day, did you have an opportunity, if however brief, to speak to your son at the conclusion of the proceedings on Friday, April 7th, that first day of jury selection?

A: No. [77]

Q: You didn't have a chance to speak to him?

A: Not to my knowledge.

Q: Okay. And when jury selection continued on Monday, April 10th, do you recall if you were in the same—outside the same courtroom or had the locations moved?

A: I'm sorry. Can you repeat that, please.

Q: When you came back to court on Monday, April 10th, did you come back to the same courtroom or did you have to go to a different courtroom? Had the proceedings moved?

A: I'm not for sure. I know that—I think one time it had switched. I'm not for sure though.

Q: Okay. Fair to say that a lot of the floors in this building resemble each other?

A: Correct.

Q: Okay. Did you see a lot of jurors outside the courtroom on Monday? Did you see a big crowd outside the courtroom on Monday again?

A: I saw a lot of people. [78]

Q: A lot of people. Okay. And it wasn't for you to distinguish whether they were there as potential jurors or they had other business in the building that day.

A: Right.

Q: You were just there.

A: Yes.

Q: Okay. Now I'll ask the same series of questions. Fair to say that on that day you saw the same thing taking place, prospective jurors going into the courtroom?

A: Yes.

Q: Okay. To your knowledge the door was not locked?

A: To the knowledge—to my knowledge? When?

Q: When the jurors were going in, prospective jurors were going in.

A: No.

Q: Okay. You saw the same court official or court officer?

A: I can't say if it was the same one, but I seen him.

Q: A court officer. [79]

A: Correct.

Q: Fine. Fair to say, ma'am, that you didn't see any sign posted: Do not enter. Public out. Courtroom closed.

A: That's correct.

Q: That's correct. You didn't see that.

A: No.

Q: Now did the same thing happen on Monday? Were you told by a court officer that you couldn't go into the courtroom until the jury was picked?

A: Yes.

Q: Now jury selection took a big part of that day. Do you remember breaking—the Court taking a recess for lunch?

A: On which day?

Q: On Monday now.

A: Yes.

Q: Okay. And again, did you have the same conversation that you had with Mr. Davis on Friday? Did you let him know that again you hadn't been allowed into the courtroom?

A: No. I just—no.

Q: Not on that day. [80]

A: No.

Q: Okay. But you did on Friday.

A: Right. We spoke each day.

Q: Okay. And as far as you speaking, was that for purposes of him keeping you abreast or keeping you—letting you know what was going on as far as how everything was progressing inside the courtroom?

A: I would think so.

Q: You remember two members of the Boston Police Department who at one point came to your house, Sergeant Detective O'Leary? Do you remember him?

A: Correct, yes.

Q: And do you remember Detective Paul McLaughlin?

A: Is it fair to say that neither of them had a conversation with you either on Friday or Monday telling you you couldn't go into the courtroom?

A: Correct.

Q: Now you prepared an affidavit. It's dated March 6th, 2011, and you wound up providing that affidavit to Ms. Greenberg? [81]

A: Correct.

Q: And did she wind up contacting you some time in 2011, talking to you about the case?

A: No.

Q: The appeal.

A: The appeal?

Q: Yes.

A: No.

Q: At what—

A: She told—

Q: Well, let me ask you this, ma'am. Just showing you this affidavit, as best you can for the Court just describe, how did this come into existence?

A: This here was because she had said that she needed an affidavit for saying if I was able to go into the courtroom.

Q: Okay. Now some five years later you remember the trial happening in 2006?

A: Yes.

Q: Now that's—

A: I don't know if that's the correct year. I'm sorry. [82]

Q: For purposes of this hearing assuming 2006, some years later she reached out to you.

A: Yes.

Q: And the affidavit, you dated it March 6th of 2011.

A: Okay.

Q: And who first brought up the topic of not being allowed into the courtroom? Was that you or was that Ms. Greenberg who brought up that subject?

A: It was myself.

Q: And you made her aware of that.

A: Yes.

Q: Thank you very much for your time, ma'am.

THE COURT: Any further questions?

MS. GREENBERG: No, Judge. Thank you.

THE COURT: Mrs. Weaver, thank you very much.

THE WITNESS: Thank you.

THE COURT: Is that it, Ms. Greenberg?

MS. GREENBERG: That's it for me, [83] Judge. I think I can save some time by stipulating to some of the Commonwealth's witnesses. It's clear there's no—we don't need to call those two police officers because the witness testified it wasn't them, agreed it wasn't them. I'm not going to argue that it was. I think there are three court officers on his list that—they have stated the same. They don't remember that they were at this trial. So the statements they gave to the police officers, I stipulate to that. And as to the victim-witness assistant person, I don't think we need him either. He's going to say I didn't tell them, and that's fine. I can stipulate to that. So there is nothing in the pile of people that they want to call. I can agree to all of it, and I would like to argue.

THE COURT: Well, let me hear from Mr. Pappas because I have to respect what he wants to do.

MR. PAPPAS: I think we would like to make our record with the witnesses, Your Honor. [84]

THE COURT: Okay. That's fine.

MR. PAPPAS: Given the nature of the testimony.

THE COURT: That's fine.

MR. PAPPAS: I think they will be fairly brief witnesses.

THE COURT: Okay.

MR. PAPPAS: Michael Glennon.

MICHAEL GLENNON, SWORN.

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

MR. PAPPAS: May I inquire, Your Honor?

THE COURT: You may.

DIRECT EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, sir.

A: Good afternoon.

Q: Can you please just state your name and spell your full name for the record.

A: Michael Glennon, G-L-E-N-N-O-N.

Q: And you work for the Suffolk County [85] District Attorney's Office?

A: I do.

Q: In what position?

A: I am both a victim-witness advocate as well as the Director of Community Based Juvenile Justice.

Q: And how long have you been working as a victim-witness advocate in the district attorney's office in Suffolk County?

A: Twenty-four years.

Q: And during those twenty-four years, have you had occasion to work on homicide cases?

A: I have.

Q: Approximately how many?

A: About fifty.

Q: And just very generally, could you describe for the Court your duties and responsibilities as a victim-witness advocate.

A: As a victim-witness advocate I am the conduit to victim and witnesses of crime. Under Chapter 258B, they have the right to be informed about the court proceedings, as well as help with intervention in the trauma of the [86] violent crimes that brought them to the—brought into the criminal justice system, and following along with them the proceedings in the court.

Q: And typically, would you have any involvement in a homicide case if a person were to be charged, or persons were to be charged, with the defendant's families—

A: No.

Q: —and provide them services?

A: No, I would not.

Q: Okay. I want to direct your attention back to 2003, at some point were you the assigned victim-witness advocate regarding he homicide of Jermaine Rutger that occurred on August 10th of 2003?

A: I became the assigned advocate in that case at some point in time during the case. I was not originally. I believe a colleague of mine was, who then left the office and I became involved.

Q: Okay. And at the time the case went to trial in 2006, you were the assigned advocate? [87]

A: I was.

Q: Fair to say that during the pendency of the case until it went to trial you had contact with

Jermaine Rutger's—frequent contact with Jermaine Rutger's grandparents?

A: I did. Yes, his adopted parents.

Q: Moses Rutger and Rosa Rutger?

A: Yes.

Q: And also some contact, if not frequently, some limited contacted with Jermain Rutger's uncle, the Reverend William Dickerson?

A: Yes.

Q: Okay. During the pendency of the case, did you become aware at some point that Kentel Weaver was the individual charged for the death of Jermaine Rutger?

A: Yes.

Q: And again, during the pendency of the case, did you become aware of the brother of Kentel Weaver, an individual by the name of Kessine Weaver, who was murdered in June of 2004?

A: I was aware that his brother had been murdered. [88]

Q: And a person by the name of Rakeem Young was indicted for that homicide?

A: Yes.

Q: You weren't the advocate assigned to that particular case, correct?

A: No.

Q: Directing your attention to the trial of Kentel Weaver, directing you back to April 7th, 2006, a Friday, and then Monday, April 10th, 2006, in

this courthouse, are you aware that the trial started on those two days?

A: I am.

Q: And that was in this building?

A: It was.

Q: And do you remember who the defendant's attorney was for that trial?

A: It was Mr. Davis.

Q: And do you recall on Friday, April 7th, and then on Monday, April 10th, jury selection took place in two different courtrooms in this building?

A: Yes.

Q: One being on the tenth floor in courtroom 1015, and the other being in [89] courtroom 914 on the ninth floor?

A: Correct. Yes.

Q: And were you at the courthouse for those days?

A: I was.

Q: And fair to say that you were aware back then who Iris Weaver was?

A: I'm not sure when I became aware of who Mrs. Weaver was, whether it was either during the trial itself or it was prior to the trial actually starting.

Q: Okay. Did you—were you aware that she was with someone by the name of Susan Dunigan, a person who wore a—for lack of a better term a uniform?

A: Yes. I remember her being at the trial with Major Dunigan.

Q: And referred to herself as Major Dunigan?

A: Yes.

Q: Okay. And did you see them outside in the hallway today prior to testifying?

A: I did.

Q: And those are the same two individuals [90] that you recall as being Iris Weaver, Kentel's mother, and Major Dunigan?

A: Yes.

Q: Okay. Did you have any contact with either of those two individuals leading up to and including the two days of jury selection?

A: I don't remember seeing them at that point in time.

Q: Okay. Not whether you saw them. Did you have any contact with them?

A: I did not have any contact with them.

Q: Okay. So is it fair to say if you didn't have any contact with them on the two days of jury selection, Friday, April 7th, and Monday, April 10th, you wouldn't have been in a position to tell them that they could not go into the courtroom during jury selection?

A: No.

Q: And did you yourself—were you yourself able to get into the courtroom on either of those days?

A: I was monitoring the courtrooms on those days as the jury selection process happened to see when it was going to end so [91] when the trial would begin.

Q: And fair to say that part of your monitoring the jury selection process would have—be having periodic contact with me, whether it might be at the end of the day on Friday, a quick recess in the morning on Monday, or lunch Monday afternoon to get updates on how the jury selection process was unfolding?

A: Correct. Those are the times I would have tried to come by the courtroom when I knew you would have been available to talk to let me know how it's going.

Q: And why would you be interested in that type of information for purposes of doing your job?

A: To know when openings were going to be so that I could alert the family members, Rosa and Moses, to be in the courtroom to hear openings.

Q: And potentially other witnesses when they would need to be at the courthouse for the beginning of the trial?

A: Correct. [92]

Q: Okay. With respect to those two courtrooms, Mr. Glennon, 1015 and 914, at any point do you have a recollection of the courtroom doors being closed or locked during jury selection?

A: No. I don't have any.

Q: Do you have recollection of seeing sign on the door saying either: Do not enter. Public Not Allowed. Anything to that effect?

A: I never saw any signs like that.

Q: You've been doing this for twenty-four years?

A: Correct.

Q: And you're aware that the Trial Court, especially this particular courthouse, the Suffolk County Courthouse, is staffed with court officers?

A: Yes.

Q: You know who they are?

A: I know many of them.

Q: Did any court officer ever approach you during the two days of jury selection for this trial telling you that you couldn't go [93] into the courtroom?

A: No. No court officer did that.

Q: Thank you very much.

MR. PAPPAS: I don't have anything further.

THE COURT: Thank you. Any questions?

MS. GREENBERG: Yes, Judge.

CROSS-EXAMINATION BY MS. GREENBERG:

Q: I don't know that you remembered. Were you with Rosa and Moses on the sixth floor of the courthouse for this jury selection?

A: I'm not sure if—that's oftentimes a place that we would have people. That's where the grand jury is, and that's where we have rooms to keep people. So that's oftentimes a place where we would have people wait.

Q: Were Rosa and Moses in the courthouse on those two days?

A: I don't know if they were here on Friday. I know that they were here on Monday.

Q: And why would they be on the wrong floor? I mean, how did they get to the sixth [94] floor? Were you in contact with them on that day?

A: I was in contact with them. I don't know that it would be the wrong floor. The sixth floor is where the district attorney's office has offices and the grand jury, and that's oftentimes where we have people wait.

Q: Do you know why they weren't in the courtroom when the trial was being conducted?

A: They were there waiting for the trial to begin, opening statements.

Q: Well, were they waiting for jury selection to be over?

A: Yes.

Q: Thank you.

MS. GREENBERG: Nothing further.

MR. PAPPAS: Just briefly.

REDIRECT EXAMINATION BY MR. PAPPAS:

Q: Did they ever make a request, either Rosa Rutger or Moses Rutger,—you're aware they are both deceased now?

A: I actually think Rosa is.

Q: Okay. Well, let me ask you this. Did [95] they ever make a request to be present in the courtroom during jury selection?

A: No, they did not.

Q: And there's a family waiting room equipped with furniture that's arguably a little bit more comfortable than the wooden benches outside all the trial sessions?

A: That's correct.

Q: And that's an accommodation that's afforded to many, many victims and witnesses in the cases that are prosecuted in this building?

A: That's correct. It's actually in the victim's bill of rights.

Q: Thank you.

MR. PAPPAS: I don't have anything further.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

THE COURT: You may step down. I'm dealing with the domino effect of Friday. I had a hearing that I was supposed to be doing this afternoon. I put it off to four o'clock. So I can be here until four o'clock, but after that I have to go. [96]

MR. PAPPAS: Can we try to squeeze one more witness in, Your Honor?

THE COURT: Sure.

MR. PAPPAS: I think—

THE COURT: No, no. I mean, it's upstairs.

MR. PAPPAS: That's all I have.

THE COURT: It's prisoner cases, but you know, I had to shuffle things to accommodate you this afternoon.

MR. PAPPAS: And this is the last witness I have.

THE COURT: That's fine. I just wanted you to know that I have to leave at four.

MR. PAPPAS: Sergeant O'Leary.

TIMOTHY O'LEARY, SWORN.

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

MR. PAPPAS: May I inquire, Your Honor?

THE COURT: You may. [97]

DIRECT EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, sir. Could you please introduce yourself to the Court and spell your last name.

A: Yes, sir. My name is Thomas J. O'Leary, O-'-L-E-A-R-Y.

Q: And you work for the Boston Police Department?

A: Yes, sir.

Q: And your current rank is that of sergeant detective?

A: Yes, it is, sir.

Q: How long have you held that rank for?

A: Since 1993.

Q: Directing your attention back to 2003, were you assigned to the Homicide Unit back then?

A: Yes, I was.

Q: And did you work at least with one detective by the name of Paul McLaughlin?

A: Yes.

Q: He worked under your supervision back in 2003?

A: He did. [98]

Q: He has also since been promoted to sergeant detective, and he is still in the Homicide Unit?

A: He has.

Q: Are you still in the Homicide Unit, sir?

A: No. I'm the supervisor of night detectives at Area B-2 in Roxbury.

Q: And how long have you held that position, sir?

A: For the past six years.

Q: Okay. Directing your attention back to August 10th of 2003, were you aware of a homicide involving Jermaine Rutger?

A: Yes.

Q: That occurred on August 10th?

A: Yes.

Q: On Wendover Street in Roxbury?

A: Yes.

Q: You wound up becoming the primary investigator for that homicide?

A: Yes, I did.

Q: And you were the investigator through the investigation that you conducted, the grand [99] jury investigation, all pretrial motions, including motions to suppress and ultimately the trial in April of 2006?

A: That's correct.

Q: Okay. During the course of your investigation, did you come to know Kentel Weaver's mother, Iris Weaver?

A: Yes, I did.

Q: And in fact you conducted an interview of the defendant, Kentel Weaver, in her house?

A: Yes, we did.

Q: During your investigation.

A: Yes, we did.

Q: And certain statements that were made both at the house and later at District 2 became the subject of a motion to suppress?

A: Yes, they did.

Q: That was litigated at the courthouse down on Devonshire Street?

A: Yes, it was.

Q: Before Her Honor, Justice Hines?

A: Absolutely.

Q: And during the course of the time that you were involved in the case, from August 2003 [100] at least up until that point, the motion to suppress, did you become aware of some other family members in Kentel Weaver's home?

A: Yes.

Q: Would that include a brother that he had, Kassine Weaver?

A: Yes.

Q: Another individual who lived there by the name of Paul Smith?

A: Yes.

Q: Certainly you knew Iris Weaver.

A: Correct.

Q: And did you become aware of an individual during the pendency of this case by the name of Major Susan Dunigan?

A: Yes.

Q: And to your knowledge based on your role as the investigator in this case, she wasn't any type of percipient witness. She provided pastoral support to Iris Weaver?

A: That is correct.

Q: But you knew who she was.

A: Yes.

Q: Okay. Now during the pendency of [101] Kentel Weaver's case, did you become aware sometime in June of 2004 that his brother, Kassine Weaver, was the victim of a homicide? Was a homicide victim himself?

A: Yes.

Q: And an individual by the name Rakeem Young was actually prosecuted for that murder?

A: Yes.

Q: Now directing your attention to April 7th, 2006, as it relates to Kentel Weaver, does that date have any significance to you?

A: Yes.

Q: And what significance does it have, sir?

A: That's the day we started jury selection in this building.

Q: And it actually started—jury selection started later in the day on that Friday, April 7th, 2006?

A: Yes, it did.

Q: Did it start on the tenth floor?

A: Yes, it did.

Q: And that would have been courtroom 1015? [102]

A: Correct.

Q: Did jury selection conclude in that courtroom?

A: It did not.

Q: Did it move when proceedings resumed on Monday, April 10th, 2006?

A: It did, down one floor.

Q: Right underneath, courtroom 914?

A: Yes, sir.

Q: Now you've been a member of the Boston Police Department for how long, sir?

A: Since 1985.

Q: And fair to say that you have had more than one tour in the Homicide Unit than the one you referenced that was taking place in 2003?

A: Correct.

Q: Approximately how many homicide prosecutions, cases that actual went to trial, have you been involved in, sir?

A: I would say probably at least one hundred.

Q: Okay. And have you—as part of those prosecutions, as part of being an investigator, and as part of being involved in [103] those cases, did you have the opportunity to—at least from a peripheral standpoint the opportunity to observe the jury selection process?

A: Yes.

Q: On many occasions?

A: Yes.

Q: And would that include both at this courthouse, the Suffolk County Courthouse, and when the court's business was being conducted at the old federal courthouse on Devonshire Street for a number of years?

A: Yes.

Q: Now jury selection started in this particular case you said on April 7th, 2006?

A: It did.

Q: You said in courtroom 1015?

A: Correct.

Q: Were you at the courthouse on that day?

A: I was.

Q: And were you in contact with me? You knew I was the prosecutor assigned from day one on this case? [104]

A: Yes.

Q: And typically, what is your function as far as the first day of jury selection? What are your responsibilities?

A: Well, even leading up to the first day, I would say a week/two weeks/three weeks leading up to it, you're pretty much connected to the—connected at the hip with the prosecutor getting ready for trial, prepping witnesses and locating witnesses. On the first day of trial, which would be the first day of jury selection, ideally one detective from the squad would be assigned to the floor to work hand in hand with the district attorney, to keep a calendar, if you will, to get ready for the view, just to be aware of when the—when the jury was just

about ready to be selected, when the view was going to be set up, and dates and times as to when to start shepearding witnesses and police officers into the court.

Q: And fair to say that the view has a lot of working parts as far as you having to coordinate an escort for a bus so that the [105] jurors can be escorted to the location of where the incident occurred so that they can move about freely on the city streets without fear of being interrupted, and you're responsible for coordinating that?

A: Yes.

Q: And Friday, April 7th, 2006, there were a number of pretrial motions that were litigated?

A: Yes, there were.

Q: And is it fair to say that one of the motions that you knew was going to be litigated on that day was the motion for a view?

A: Correct.

Q: And you would have to coordinate setting up that view as soon as Friday, April 7th, 2006?

A: Perhaps.

Q: Okay. As far as jury selection itself goes, are you aware that jury selection actually commenced on that Friday, April 7th, 2006?

A: Yes, it did.

Q: Fair to say it was later in the day? [106]

A: Yes, it was.

Q: And typically on a single-defendant case, in your experience approximately how many jurors would be brought up to impanel a jury of sixteen?

A: I would say over—at least one hundred or so, over a hundred.

Q: In that ball park?

A: Correct.

Q: Okay. And you've been—you have a level of familiarity with the courtrooms in this building, sir?

A: Absolutely.

Q: You familiarity with courtroom 1015 and courtroom 914?

A: Yes, sir.

Q: Directing your attention to the galleries of those particular courtrooms, are they approximately the same size?

A: Yes.

Q: And about how many people roughly could fit in the galleries of those two courtrooms?

A: I would say fifty/sixty probably. [107]

Q: Okay. And if the number were—if we were to go on the low end, fifty people approximately fitting in the gallery of that courtroom, could another potential sixteen be seated in the area of the jury box?

A: Yes.

Q: So that would give you roughly in the neighborhood of sixty-six people being accommodated for jury selection.

A: Well, in the courtroom and—

Q: In the courtroom.

A: Yes.

Q: Okay. Were you present when the jurors were brought up on Friday, April 7th?

A: Yes.

Q: And after the—or prior to that point, did you have any contact with Major Dunigan, Iris Weaver or Paul Smith that they couldn't go into the courtroom for jury selection?

A: None whatsoever.

Q: Okay. Do you have a recollection if Detective Paul McLaughlin was there on that Friday? [108]

A: I don't recall.

Q: Okay.

A: Paul was here. I can't say was he with me when the jurors were brought up, but he was my partner.

Q: Okay.

A: I would be the—for that case I was the--in the courthouse, logistics guy. Paul would be the street guy waiting for my orders to get ready for the trial.

Q: Okay. So fair to say—just so we can have a range, fair to say that somewhere in the neighborhood of eighty to one hundred jurors, in that ball park, were brought up for jury selection?

A: Absolutely.

Q: And do you have a memory of not all the jurors or—do you have a memory of all the jurors not being able to fit into courtroom 1015?

A: Yes.

Q: And where were they as a result of not being able to fit into courtroom 1015?

A: They would be—my recollection is [109] that—I think they were in another courtroom, and then there would be some out in the hallway as well.

Q: Okay. And do you have a recollection of ever seeing a sign on the courtroom doors on that Friday of the courtroom being closed?

A: Never. No.

Q: Were you aware of the courtroom ever being locked during jury selection?

A: I'm not aware of it, no.

Q: Did anyone ever bring to your attention, either anyone from the district attorney's office or a court officer employed by the Trial Court, that either Mrs. Weaver or Major Dunigan would not be allowed into the courtroom during jury selection?

A: No.

Q: And is it your memory that jury selection started later in the day on Friday, April 7th?

A: Yes.

Q: And approximately is it your recollection that one juror was selected?

A: That's correct. [110]

Q: And that the jury selection process for all intents and purposes had just begun on Friday, April 7th?

A: Correct.

Q: Were the same number of jurors approximately brought back to the courthouse on Monday, April 10th, 2006?

A: Yes, they were.

Q: And this time to a different courtroom?

A: Correct. Downstairs, down one floor, on the ninth floor.

Q: Courtroom 914?

A: Correct.

Q: And was that approximately the same size as courtroom 1015?

A: It is.

Q: So it had approximately the same seating arrangements in that approximately fifty or so jurors, prospective jurors, could sit in the gallery and another sixteen in the actual jury box?

A: Correct.

Q: And was it the same arrangements on [111] that particular day, that certain jurors, prospective jurors, had to wait outside the courtroom?

A: Yes.

Q: Did you ever have any contact with Major Dunigan or Iris Weaver saying that they couldn't go into the courtroom?

A: None.

Q: Were you aware of the courtroom being locked at any time during jury selection?

A: No, sir.

Q: On Friday and Monday did you see prospective jurors going into the courtroom?

A: Yes.

Q: Did you ever see a sign on any—on the courtroom door on Monday, courtroom number 914, that the courtroom was locked?

A: Never

Q: A Do Not Enter sign, No Admittance, anything to that effect?

A: Never.

Q: Did you see both Iris Weaver and Major Dunigan both on the first and second day of jury selection? [112]

A: I believe so.

Q: Okay. Did you acknowledge Mrs. Weaver?

A: I always do.

Q: Okay. Like you did today?

A: Yes.

Q: And like you did last Friday.

A: Yes.

Q: Have you seen her in the community since 2003?

A: Many times.

Q: Okay. And you acknowledge her each and every time?

A: I do.

Q: Did you ever say to them—did you ever have any communication with her or Major Dunigan at any point during jury selection that they couldn't go into the courtroom?

A: None.

MR. PAPPAS: That's all I have.

THE COURT: Thank you.

Any questions, counsel?

MS. GREENBERG: None, Judge.

THE COURT: Okay. [113] Sergeant Detective, thank you very much.

THE WITNESS: Pleasure to see you again, Judge.

THE COURT: Thank you. You have time. Do you want to have—

MR. PAPPAS: That's all we have for today.

THE COURT: Okay.

MR. PAPPAS: What we would like to do if it's agreeable to the Court we would like to confer whether there's some type of stipulation we could enter into regarding the last—the last four—who would be the last four witnesses, Your Honor.

THE COURT: Okay.

MR. PAPPAS: And might be able to do that, and perhaps we can set this up for either the conclusion of the presentation of the Commonwealth's witnesses and/or argument for that day. If that's agreeable?

THE COURT: Sure. I set aside Monday and Friday afternoons - I don't schedule my own motions - so that I can deal with matters like [114] this. So tell

me what Monday or Friday you would like to finish this up. Yes, Ms. Greenberg.

MS. GREENBERG: I can come this Friday, Judge.

THE COURT: This Friday I can't do it. We have a court conference this Friday.

MS. GREENBERG: I can come next Friday.

THE COURT: Okay. Next Friday is—

MS. GREENBERG: Judge, I apologize. That Friday is a Jewish holiday. I can't come.

THE COURT: Okay. Friday, the 13th.

MR. PAPPAS: Friday, the 13th, or Monday, the Monday—

THE COURT: That's a holiday I think. Monday, the 16th, isn't it?

THE CLERK: It is.

MR. PAPPAS: Your Honor, can I suggest a week from today, Monday, the 2nd?

THE COURT: Monday, the 2nd.

MS. GREENBERG: I have—I'm in this courthouse in front of Judge Brady.

THE COURT: Okay. [115]

MS. GREENBERG: But the Monday after the 2nd, Monday, the 9th?

THE COURT: The 9th, I think so. See, I'm not in my courtroom, and I didn't bring my calendar with me. Okay. Two o'clock Monday, the 9th, is that what you would like?

MS. GREENBERG: Yes.

MR. PAPPAS: I think we will be available, Your Honor.

THE COURT: Okay. So let me just write that down, and I will let you know if there's a problem with that date. Okay. Now that you've heard all the evidence, you might want to consider giving me your point of view on the case, how the law applies to what we've heard through the witnesses, so arguments. So if you want to do that on the 9th in addition to presenting any other witnesses that you have, that's fine.

MS. GREENBERG: Judge, if we can agree, I have four witnesses statements for the Commonwealth. I would be happy to put those in if we're done with the evidence.

THE COURT: Well, I'll leave that to [116] you all to talk about. Okay. Thank you all very much.

MR. PAPPAS: Thank you, Your Honor.

MR. PAPPAS: Thank you, Judge.

(Whereupon, court was adjourned.)

Commonwealth *vs.* Kentel Myrone Weaver

SUCR2003-11293

SUPERIOR COURT

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

The defendant, Kentel Myrone Weaver ("Kentel"), was convicted after jury trial on April 26, 2006, on indictments charging first degree murder in violation of G.L. c. 265, § 1 (Count 1), and possession of a firearm without a license in violation of G.L. c. 269, § 10(a) (Count 2). The trial judge (Neel, J.), now retired, sentenced the defendant to a mandatory life term at MCI Cedar Junction on the murder conviction and a concurrent term of one year to one year and a day on the firearms conviction.[1]

On June 1, 2011, the defendant filed his motion for new trial alleging ineffective assistance of counsel relating to trial counsel's treatment of the defendant's confession, and claiming a violation of his Sixth Amendment right to a public trial. The motion was bifurcated by agreement of the parties. Judge Geraldine Hines conducted an evidentiary hearing on the public trial issue in March, 2012, and issued a memorandum of decision on February 22, 2013, ruling

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[1] It is undisputed that the defendant, a juvenile at the time of the murder, is entitled to the benefit of a corrected mittimus to reflect that his life sentence under G.L. c. 265, § 2 carries with it the opportunity for parole consideration after fifteen years. See *Diatchenko v. District Attorney for Suffolk County*, 466 Mass. 655 (2013), and *Commonwealth v. Brown*, 466 Mass. 676 (2013).

that although the courtroom was improperly closed to family members during jury empanelment, the defendant is not entitled to a new trial because there was no objection to the closure, resulting in a waiver of the claim.[2]

In January, 2014, the defendant supplemented his motion for new trial, submitting to the court affidavits of Professor Alan Hirsch and Psychologist Frank DiCataldo (Pleading No. 139). The defendant also requested an evidentiary hearing. On April 30, 2014, the Commonwealth filed an opposition to the motion (Pleading No. 144). After preliminary hearings relating to discovery requests and the like, the Court held evidentiary hearings on April 29, 2014, July 16, 2014, and August 22, 2014. Thereafter, the parties were given until September 26, 2014, to file supplemental memoranda (the Commonwealth did, the defendant did not) and the matter was taken under advisement. For the reasons set forth below, the defendant's motion is DENIED.

BACKGROUND

The defendant, age sixteen at the time, surrendered to Boston Police detectives on August 27, 2003, telling the police in the presence of his mother, "I shot Germaine Rucker."[3] His statement related to the

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[2] Judge Hines was prescient in her ruling. In two cases since her decision, the Supreme Judicial Court has adopted her precise reasoning, finding that the failure of counsel to object to a courtroom closure at the time of trial results in a procedural waiver of the claim. See *Commonwealth v. Alebord*, 461 Mass. 106, 112 (2014); *Commonwealth v. Morganti*, 461 Mass. 96, 102 (2014).

[3] The facts are drawn from the detailed Memorandum of Decision on the defendant's motion to suppress statements.

August 10, 2003 shooting death of fifteen-year-old Germaine Rucker on Wendover Street in Boston. Rucker was shot in the head and abdomen and succumbed to his wounds.

A subsequent police investigation led to a witness who reported seeing a black male wearing a baseball cap run from the scene just after the shooting occurred. During his flight, the male lost his hat. The police recovered a blue Detroit Tigers baseball cap with distinctive markings (airbrushed letter "D") on each side of the Detriot Tigers logo. The detectives later learned that the defendant had been arrested on a drug crime on July 26, 2003, and according to police records, he had been wearing a Detroit Tigers baseball cap.

The police initially focused on the defendant's older brother, Cassim Weaver, as possibly connected to the shooting. On August 22, 2003, detectives brought Cassim to the police station and questioned him about the shooting. While at the station, Cassim called his mother, Iris Weaver, and told her that the police had taken him to the station to question him about Germaine Rucker's shooting. Iris Weaver, distraught about this news, went to the police station in search of her son, and was informed that he was not there. Cassim, having satisfied the detectives that he was not involved in the shooting, had been driven home by a police officer.

The detectives then focused on the defendant. Sergeant Detective Thomas O'Leary went to the Weaver home and spoke with Iris. He apologized for the way Cassim had been brought to the police station and indicated that he wanted to speak with her other son, Kentel. Ms. Weaver stated that Kentel was at camp but would be returning home on Sunday, August

24. Ms. Weaver agreed that they would meet with Sergeant Detective O'Leary on Monday, August 25.

Around 8:30 p.m. on August 25, Sergeant Detective O'Leary and his partner, Detective Paul McLaughlin, went to the defendant's home where they informed the defendant and his mother that they wanted to question Kentel about the Rucker shooting. They were not told, however, that the defendant was suspected of being involved in the crime. Concerned that the detectives could take Kentel to the station for questioning as they had done with Cassim, she consented to an interview in her home.

Before any questions were asked, the detectives produced a juvenile waiver form that contained printed Miranda warnings, stating that such warnings were routine. After reviewing each of the warnings with the defendant and his mother, and providing them an opportunity to consult in private, the detectives obtained a signed waiver (by mother and son) and commenced questioning the defendant. The questioning took place over the course of approximately three hours at the dining room table. Ms. Weaver was either present at the table or, from time to time, in the adjoining kitchen area preparing dinner. In summary terms, the defendant denied being involved in or present at the time of the shooting. The detectives questioned the defendant about a leg injury he sustained, asking him if maybe he had fallen off a bicycle on the night of the shooting. The defendant denied that, telling the police that whoever said that was lying. Instead, Kentel claimed that he injured his leg while playing basketball and, after reviewing a calendar, stated that the injury occurred on August 12 (two days after the shooting).

The police also questioned the defendant about his baseball cap. Kentel acknowledged that he wore a blue Detroit Tigers baseball cap and that he had taken it to a downtown Boston store which airbrushed the letter "D" on either side of the Tigers' logo. When asked where the cap was, Kentel stated that it was either stolen or lost on the same night he injured himself playing basketball. The defendant denied any involvement in the events surrounding Rucker's shooting and the police told him they believed that he was present on Wendover Street and was involved in the shooting. Sergeant Detective O'Leary stated that he needed to know the truth and would continue with the investigation. Before leaving the house, O'Leary spoke with Iris, urging her to have a "heart to heart talk" with her son and try to obtain the truth.

After the detectives left, Iris Weaver began her own questioning of her son, concerned that he had not been truthful with the police and especially because his baseball cap had been found at the scene of the shooting. Separate and apart from Sergeant Detective O'Leary's request, Iris had her own desire to clarify her son's involvement in a very serious crime, wanting "to have some peace with this thing." She questioned Kentel for an hour, telling him that she did not believe his answers. She sat up most of the night thinking about the situation.[4]

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[4] Differing versions of the events occurring at the defendant's home on August 25 and 26 were presented at the suppression hearing. In their September 26, 2014 Opposition to Defendant's Motion for New Trial (Pleading No. 152) the Commonwealth recites testimony of Iris Weaver and Paul Smith to support its claim that Iris' questioning of her son was neither as heated nor intense as the defendant now suggests. This Court draws its facts

Iris went to work the next morning but was still focused on the shooting incident and Kentel's possible involvement. She left work and arrived home at approximately 10:00 a.m. She questioned Kentel until, after about an hour, she stopped because he had given her a headache. A half hour later, she resumed her conversation with Kentel, continuing on an off through the afternoon. She introduced God into the discussion, telling the defendant that there were no secrets from God and that for the sake of his soul he had to confess. Iris prayed aloud, at one point joined by the defendant's sister, Treyana. Her repeated entreaties bore fruit, the defendant ultimately acknowledging that he had been in the area when the shooting took place. When asked if he did it or knew who did, Kentel put his head down, a gesture that Iris interpreted as a "yes." She continued to implore the defendant to tell the truth, telling him that it was necessary for the good of his soul.

Sometime around 4:00 p.m., Iris Weaver called Sergeant Detective O'Leary to tell him about the day's events. She left a message and received a return phone call about four hours later. She informed O'Leary that she was bringing Kentel to the police station. When asked if that meant Kentel was involved in the shooting, Iris responded, "yes."

At some point, the defendant told his mother he did not want to go to the police station. She continued to implore him to confess as a necessary means of being right with God and saving his soul. According to the motion judge, "In the end, he succumbed to his mother's demands that he confess for the good of his

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from those found by the motion judge in her memorandum of decision.

soul and turn himself in to the police." Memorandum of Decision, p. 4. Iris then outlined a plan: they would go to the police station where Kentel would say, "I shot Germaine Rucker," but that the defendant would say nothing more until an attorney had been appointed.

The family held a prayer session into the night and then went to the nearby station, praying aloud as they went. Arriving at the Area B-2 station at approximately 12:30 a.m., the family stood in a circle, praying for Kentel, who was crying at the time. Sergeant Detective O'Leary and Detective McLaughlin arrived about 15 minutes later. Iris Weaver approached them and stated that Kentel had something to say, after which she expected that he would be arrested and that she wanted him to have an attorney before any questioning occurred. O'Leary, assuming that Kentel would make an incriminating statement, advised Iris that he would not take any statement until Kentel was represented by counsel. He produced a juvenile Miranda form and began reciting Miranda rights to the defendant, who then interrupted by saying, "I shot Germaine Rucker." O'Leary then placed the defendant under arrest.

The defendant was ultimately indicted by a Suffolk County grand jury. Willie J. Davis, an experienced criminal defense lawyer, represented the defendant. On February 11, 2004, Davis filed a motion to suppress the defendant's August 25 and 27, 2003 statements. He asserted a variety of grounds, including that Iris Weaver did not qualify as an "interested adult," that she was an agent of the police in obtaining the August 27 statement, and that Kentel's statements were involuntary and coerced. The motion was supported by affidavits of the defendant and his mother. In her

affidavit, Iris Weaver described the events that had occurred on the afternoon of August 27:

> During the afternoon questioning, Kentel admitted to being in the area of the shooting. During this questioning I was yelling and screaming at him. I said to him that I thought he knew more than he was telling me. I said to him that I had not slept since the police were here. I asked him if he had been at the scene at the time of the shooting. He responded that he had. I then asked him, "do you know who the shooter is, or were you the shooter." He put his head down. I took this to mean that the answer was "yes."
>
> After speaking with Detective O'Leary, I told Kentel that he needed to tell the police what he knew that he would have no kind of life if he did not tell what he knew. At that time Kentel still had not said that he did it.
>
> I took Kentel to the police station around 10:30 p.m. Paul Smith, my boyfriend, and Treyana, my daughter, were with me. At the station, I told Detective O'Leary that Kentel had something to say.
>
> Kentel has always been an obedient child. I believe and therefore aver that any admission he made was coerced by me.

Affidavit of Iris Weaver.

The defendant's affidavit followed a similar thread, the defendant averring that he was raised to obey his mother and did not understand that he could disobey his mother by invoking his right not to speak with the police .

An evidentiary hearing commenced on the motion on July 22, 2004 and continued on August 5, 2004. Further submissions were filed by the parties, and arguments on the motion were heard on November 29, 2004, before Judge Hines, then sitting in Middlesex Superior Court. The judge issued a comprehensive decision in September, 2005, detailing (as recounted above) the interactions between the defendant and his mother, her motivations for insisting that Kentel admit his actions, and the defendant's reluctant acquiescence to her demands. The judge ruled that the defendant's statements were lawfully acquired and that the defendant's will was not overborne by his mother's entreaties such that the statements would be involuntary under the law. A request for interlocutory review of the ruling was denied by a single justice of the Supreme Judicial Court. The defendant was subsequently convicted after a jury trial in which evidence of the defendant's statement was presented.

MOTION FOR A NEW TRIAL

Represented by new counsel on appeal, the defendant filed his motion for new trial asserting, inter alia, that Attorney Davis was ineffective for (1) failing to consult an expert regarding the defendant's susceptibility to psychological coercion; and (2) failing to present expert evidence on psychological coercion at trial.[5] The motion for new trial was supported by

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[5] The defendant also claimed that Attorney Davis was ineffective because he failed to present expert testimony on a juvenile's capacity to premeditate, and failing to argue expert neuropsychological and psychiatric evidence on the issue of sentencing. Counsel did not pursue either of these claims at the evidentiary hearing or in argument to the Court and therefore, they are waived.

affidavits from Attorney Davis, Iris Weaver, and Dr. Frank DiCataldo. The Court conducted an evidentiary hearing on the motion on various dates in April, July, and August, 2014.

Attorney Davis testified that he has been a criminal defense lawyer for over forty years and has handled over 100 murder trials at the trial and appellate level. He has been qualified by the Committee for Public Counsel Services for assignment as murder counsel and served as chairman of the Committee for Public Counsel Services for over ten years. He has been a member of the Massachusetts Association of Criminal Defense Lawyers since that organization was founded and has lectured and participated in numerous continuing education programs for Massachusetts Continuing Legal Education.

Davis represented Kentel throughout the case. Because the defendant was fifteen and sixteen at the time, Davis' primary contact was Iris Weaver. He spent a lot of time discussing the circumstances surrounding the defendant's statements with Iris and formulated the defense that the police used Iris as their agent to induce Kentel to admit his involvement in the homicide. He moved to suppress the defendant's August 27, 2003 statement to the police on that ground and further, based on the claim that the defendant was impermissibly pressured by his mother to confess to the police and, in doing that, she failed to act as an interested adult for her son.

Attorney Davis described his approach to preparing a defense, first learning the facts of the case and then, starting from scratch, researching the law as it relates to the issues presented. In doing so he became knowledgeable about the state of the law as of the time

of his representation. At the time Davis litigated his motion to suppress and tried the case, he was not aware of any appellate decisions permitting expert testimony on claimed coerced or false confessions. Similarly he was not aware of any rulings by judges on the Superior Court permitting such evidence. To the contrary, he had defended one case, *Commonwealth v. Charles Monteiro*, SUCR1995-11982, where the trial judge had denied the request of the co-defendant to present expert testimony on coerced and false confessions, ruling that the proffered testimony failed to satisfy the standards for reliable expert testimony.[6] That ruling was affirmed on appeal. *Commonwealth v. Robinson*, 449 Mass. 1, 5-7 (2007). According to Davis, there was no strategic reason not to consult with or present an expert on psychological coercion and, given the nature of the defense claim that Iris had served as a police agent and pressured Kentel to admit his involvement in the shooting, it would not have hurt the case to do so.[7]

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[6] The co-defendant, Anthony Robinson, was tried six months prior to Davis' client, the cases having been severed. Attorney Davis ordered the trial transcripts and acknowledged that he would have been aware of the court decision at the time of the Monteiro trial.

[7] By the same token, Attorney Davis candidly admitted that he may have researched the admissibility of expert testimony on coerced and false confessions and determined that there was no case law permitting such evidence. His method of practice is to know a case (and applicable law) thoroughly at the time he is handling it but generally not retain the information later. Thus, at the time of the evidentiary hearing he simply had no recollection of the extent of his legal research into the issue.

Criminal defense attorney John Cunha was offered by the defendant as an expert witness in criminal trial practice. Attorney Cunha, a 1976 graduate of Boston College Law School, has been a criminal defense attorney for all but two years of his legal career. Like Davis, Cunha has been qualified to accept appointments from the Committee for Public Counsel Services in murder (and all other criminal) cases. He has been a clinical instructor in trial practice at Suffolk University Law School and Harvard Law School. He is a member of the Massachusetts Association of Criminal Defense Lawyers and served as its president four years ago.

In response to the hypothetical question, whether in the case of a sixteen-year-old claiming he was psychologically coerced into making a statement it would be deficient for counsel not to consult an appropriate expert, Attorney Cunha opined that it would be ineffective because a lawyer's duty is to investigate all of the circumstances surrounding a statement obtained by the police.

According to Cunha, a lawyer's duty is heightened where, as in the instant case, the whole case is built around the defendant's admission. Notably, Cunha's opinion was not based on the defendant's age or scientific research relating to adolescent brain development.

The basis for Attorney Cunha's opinion was explored in cross examination. He acknowledged that he had no detailed knowledge of the instant case and did not review a trial file, nor did he interview Davis, the defendant, or the defendant's mother. He was not familiar with appellate law relating to the admissibility of expert psychological evidence during the time period from 2004-2006. Rather, Cunha stated

that his opinion was a generalized statement of "best practices," although he acknowledged that the Committee for Public Counsel Services does not require that appointed counsel engage psychological experts in all cases. Moreover, on cross examination, Cunha was questioned about several cases, in Middlesex, Suffolk, and Plymouth Superior Courts, where he either did not engage a psychological expert on issues relating to the validity of a defendant's waiver, or retained but did not call the expert at trial.

The final defense witness was Frank DiCataldo, a forensic psychologist with a Ph.D. in clinical psychology from St. Louis University. Dr. DiCataldo has served as an expert witness in juvenile, district, and superior courts across the Commonwealth and has provided opinions on the voluntariness of statements in juvenile and adult cases, opining that most were voluntary but in a minority of cases opining that mental illness, drugs, or coercive factors rendered a particular defendant's statement involuntary .

DiCataldo did not find any evidence that the defendant suffered from any significant cognitive limitations and did not detect any signs of mental illness. He assumed the defendant understood and likely voluntarily waived *Miranda* warnings given by the police, although he questioned whether Iris Weaver fully understood the warnings (based on her testimony in court). DiCataldo testified that in the last five years, there has been a proliferation in research regarding adolescent brain development which show that a juvenile may be more susceptible to coercive or suggestible influences than adults. As of 2003, DiCataldo had been retained to evaluate such cases and used psychological tests to assess an adolescent's susceptibility. He was also familiar with literature

showing that children are more susceptible to psychological coercion and, as compared with adults, more likely to make a false or unreliable statement when under pressure.

With regard to the instant case, DiCataldo administered two psychological tests to the defendant (Psychological Assessment Inventory "PAI" and Neo Five Factor Inventory) which showed Kentel to be a youth with high anxiety, poor coping skills, subject to impulse decisionmaking when stressed, and somewhat compliant with authority figures. Coupled with an interview of the defendant and an understanding of the defendant's family dynamics, DiCataldo opined that by virtue of a protracted interrogation by his mother, the defendant's admissions were not the product of his own free will or rational intellect.

On cross examination, DiCataldo admitted some limitations to the bases for his opinion. He had never evaluated a voluntariness claim where the asserted coercive force was a parent (or mother in particular). He acknowledged that this was the first time he formed an opinion on the voluntariness of a statement ten years after it had been made, and that neither of the tests that he administered to the defendant were specifically focused on juveniles (in 2007, the P AI was adapted for adolescents). Similarly, DiCataldo acknowledged that there is no specific psychological tests to determine whether a person's will has been overborne.

DISCUSSION

This Court may grant a new trial "at any time if it appears that justice may not have been done." See Mass. R. Crim. P. 30(b); *Commonwealth v. Johnson*,

435 Mass. 113, 123 (2001). The standard under Mass. R. Crim. P. 30(b) is intentionally broad, and the disposition of the motion for a new trial is left to the discretion of the motion judge. *Commonwealth v. Schand*, 420 Mass. 783, 787 (1995); *Commonwealth v. Moore*, 408 Mass. 117, 125 (1990). This Court is "to apply the standard set forth in Rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631,635-636 (2001) (citation omitted).

In order to prevail on an ineffective assistance of counsel claim under art. 12 of the Massachusetts Declaration of Rights, the defendant must establish that his attorney demonstrated "serious incompetency, inefficiency, or inattention" falling measurably below that of an "ordinary, fallible lawyer" and that this deprived the defendant of an "otherwise available, substantial ground of defence." See *Commonwealth v. Phinney*, 446 Mass. 155, 162 (2006); *Breese v. Commonwealth*, 415 Mass. 249, 252 (1993); *Commonwealth v. Saferian*, 366 Mass. 89, 96-97 (1974).[8] See also *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977) (noting that defendant must show that better work might have accomplished something material for defense). If the test for effective assistance of counsel under the Massachusetts

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[8] The standard of review applied by this court is different from that to be applied by the Supreme Judicial Court on direct appellate review. Under G.L. c. 278. § 33E, a standard more favorable to the defendant applies: "whether there was an error in the course of the trial and, if there was, whether that error was likely to have influenced the jury's conclusion." *Commonwealth v. Wright*, 411 Mass. 678, 682 (1992) .

Declaration of Rights is met, the requirements of the Federal Constitution are necessarily satisfied as well. See *Commonwealth v. Montanez*, 410 Mass. 290, 295 n.7 (1991); *Commonwealth v. Fuller*, 394 Mass. 251, 256 (1985).

Effective assistance of counsel is not measured by trial counsel's willingness to indulge every available procedure no matter how futile, and failing to pursue a futile tactic does not amount to constitutional ineffectiveness. *Commonwealth v. Brady*, 380 Mass. 44, 56 (1980); *Commonwealth v. Vieux*, 41 Mass. App. Ct. 526, 527 (1996). Similarly, the reasonableness of an attorney's strategic decisions (including whether to call an expert witness) is to be evaluated according to the state of the law at the time, and not in hindsight based on later changes in the law. *Commonwealth v. Walker*, 443 Mass. 867, 871-876 (2005); *Commonwealth v. Mahar*, 442 Mass. 11, 17-19 (2004) ("We do not require attorneys to foretell the future: the attorney's advice was reasonable, and it did not become incompetent because a subsequent judicial opinion made clear an aspect of the offense that was previously less certain").[9]

The defendant claims that Attorney Davis was ineffective because he (1) failed to consult an expert in the field of coerced confessions; and (2) failed to present expert testimony at the motion to suppress

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[9] The same principle defeats the defendant's argument that the value of Dr. DiCataldo's testimony is demonstrated by the fact that the trial jury sent the judge a note during deliberations asking for a definition of "psychological coercion." The reasonableness of an attorney's judgment is not necessarily measured by events that develop later in the life of the case.

hearing or at trial on the issue of coerced confessions.

It is not at all clear why Davis would have been ineffective for failing to consult with an expert witness, separate and apart from the claimed failure to present expert testimony. Ineffective assistance has been found where trial counsel failed to investigate obvious potential defenses, most notably in cases involving mental illness. See *Commonwealth v. Roberio*, 428 Mass. 278, 279-282 (1998) (counsel's failure to investigate mental health defense constituted ineffective assistance where counsel was on notice of mental heath treatment); *Commonwealth v. Doucette*, 391 Mass. 443, 458-459 (1984) ("Failure to investigate an insanity defense would fall below the level of competence demanded of attorneys, if facts known to, or accessible to, trial counsel raised a reasonable doubt as to the defendant's mental condition"); *Commonwealth v. Alvarez*, 433 Mass. 93, 101-104 (2000) (ineffective assistance where counsel failed to investigate prior medical history that supported claim of insanity where (1) defendant was reported to be a poor historian of her medical history, and (2) due to the technical and complex nature of modern medicine, it normally takes expert assistance to understand and appreciate medical records). The common thread in such instances is that an ordinary attorney is generally not well suited to making psychiatric or psychological assessments about mental illness without expert consultation, and when the circumstances of a case suggest it, an attorney's duty is to conduct an appropriate investigation.

By contrast, in *Commonwealth v. Spray*, 467 Mass. 456 (2014}, the Supreme Judicial Court rejected

a claim that counsel was ineffective for failing to investigate the psychological effects of past methamphetamine abuse where there was no information suggesting that the defendant was suffering from a psychotic episode at the time of the crime and where, at the time of trial, the effects of methamphetamine abuse were little known in Massachusetts. Notwithstanding that such an investigation might have yielded a more powerful defense, "counsel was not under a constitutional duty to undertake a supplemental investigation." *Id.* at 476.

In the instant case, although there is no dispute that Attorney Davis did not consult a psychological expert, there is no evidence demonstrating that his failure to do so was a lapse rather than a reasoned decision. If the latter, then his decision not to consult an expert will not be considered as ineffective unless it was "manifestly unreasonable when made." *Commonwealth v. Frank*, 433 Mass. 185, 190 (2001), quoting *Commonwealth v. Coonan*, 428 Mass. 823, 827 (1999), quoting *Commonwealth v. Martin*, 427 Mass. 816, 822 (1998). Davis characterized his approach to the handling of criminal cases as "starting from scratch," which involved learning the facts of the case and then systematically researching the law as it related to the issues raised by the evidence. In this way, the trial strategy would be based on the most current law. Davis candidly acknowledged that upon the conclusion of the case, he would not retain the information in his memory. Thus, Davis testified that while he has no present memory on the point, he may well have researched the issue of the admissibility of expert testimony on coerced confessions at the time and determined that there was no case law admitting such expert testimony at the time of the defendant's suppression hearing.

Notably, the admissibility of expert testimony on psychological coercion was first addressed in *Commonwealth v. Robinson*, 449 Mass. 1, 6-7 (2007), where the court noted that, "the subject of psychological manipulation of a defendant and its relation to false confessions presents a serious issue. Competent scientific evidence that satisfies the Lanigan standard may well be useful to a fact finder in this area, but the evidence here fell far short of the standards governing the admissibility of scientific testimony." 449 Mass. at 7. Significantly, Attorney Davis represented Robinson's codefendant, Charles Monteiro, and would have been aware that the trial judge in the Robinson case had denied a defense request to admit expert testimony by Professor Saul Kassim on the issue of police coercion in interrogations based on a ruling that Kassim's proffered testimony did not satisfy the standards for the admissibility of expert testimony, and that the subject matter was not beyond the common knowledge and experience of the jury and therefore not the proper subject of expert testimony. Consistent with Mr. Davis' practice of thoroughly knowing his case at the time but forgetting the intricacies later, he had no memory of the Monteiro case when he testified in July, 2015, although he acknowledged that he would have been familiar with the severed co-defendant's case at the time.

Given his methodical approach to preparing a defense, I find it more likely than not that Davis was aware of the absence of Massachusetts case law permitting expert testimony on the psychology of coerced and false confessions, and did not consult an expert because it would not have added value to the defense. The defendant has not shown that this decision was manifestly unreasonable, or that the ordinary fallible attorney would have done otherwise.

The failure of counsel to pursue a course of action that has minimal chance of success does not constitute ineffective assistance. See *Commonwealth v. Conceicao*, 388 Mass. 255, 264 (1983); *Commonwealth v. Bart B.*, 424 Mass. 911, 915 (1997) (same).

The defendant has also failed to satisfy the prejudice prong of a *Saferian* analysis. Unless the expert consultation and testimony had been presented at trial, the defendant will necessarily fail in his burden of showing that it might have accomplished something material for the defense; i.e., that it would have made a difference. This presumes that Dr. DiCataldo would have been permitted to testify as an expert witness and to offer an opinion on a child's susceptibility to parental coercion generally, or Kentel's susceptibility to coercion by his mother.

Section 702 of the Massachusetts Guide to Evidence governs the admission of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if
>
> (a) the testimony is based upon sufficient facts or data,
>
> (b) the testimony is the product of reliable principles and methods, and
>
> (c) the witness has applied the principles and methods reliably to the facts of the case.

Mass. G. Evid. § 702 (2014) .

The Commonwealth correctly cites to the deficiencies in Dr. DiCataldo's basis for forming his opinion in its September 26, 2014, Opposition (Pleading No. 152) at pages 35-38. DiCataldo's understanding of the case was based solely on a version of events provided by the defendant and his mother. His understanding of the defendant's psychological characteristics and cognitive abilities had a two-fold basis: an assessment of the results of two general psychological assessment tests administered ten years after the events at issue; and information from the defendant and his mother. Dr. DiCataldo mistakenly believed that Iris conducted a prolonged six-hour interrogation of her son on August 26, 2003, during which she yelled, cried, and conducted prayer sessions with other family members. The facts he relied on were substantially different from those presented at the defendant's 2004 motion to suppress hearing and those found as true by Judge Hines. Moreover, Dr. DiCataldo utilized a methodology of his own creation in forming an opinion on whether the defendant's statement to the police was voluntary. He did so because he was not aware of any peer-reviewed or generally accepted methodology within the psychological community that would apply to the circumstances here. Thus, as the Commonwealth points out, DiCataldo's opinion was largely subjective and failed to satisfy the foundational requirement of Mass. G. Evid. § 702(b).

Equally problematic is whether expert testimony would ultimately have been admissible on the issue of whether parents may have a coercive effect on their children or, by contrast, whether the parent-child dynamic is so generally familiar to a fact finder that it is not properly the subject of expert testimony. See *Commonwealth v. Bly*, 448 Mass. 473, 496 (2007). See

also Mass. G. Evid. § 702. Dr. DiCataldo testified that children are generally more susceptible to pressure than adults (and therefore more likely to be coerced) based on a power differential between an adult in a position of authority and a child. DiCataldo referenced research relating to a child's susceptibility to coercion during a police interrogation as a basis for this opinion. He admitted to being unaware of any similar research regarding the coercive influence that a parent might present.

The notion that a child is likely to be influenced by a parent is hardly a matter outside of the common understanding of the average juror. By the same token, the fact that a parent may exert pressure on their child is hardly a novel proposition. Parents routinely instruct, and at times harangue, their children in daily life activities, whether they involve homework or household chores, or in matters of morality and religion. It is quintessentially the function of a parent to nurture, raise, and guide their child into maturity, and the manner in which a parent performs this duty is generally not considered coercive. Reasonably considered, the psychological influences of a parent on their child are categorically different from those of other authority figures (including police). Consequently, DiCataldo's reliance on scientific research involving the impact of psychologically coercive or manipulative techniques by police to obtain a statement do not provide a basis for his opinion that in this case, Kentel was coerced by his mother's conduct.

Dr. DiCataldo's testimony is significant in one particular; he found no evidence of any significant cognitive limitation or developmental deficiency or impairment that would have rendered the defendant as

more susceptible to parental pressure than would be the case with any adolescent. Likewise, there was no evidence that the defendant's relationship with his mother, or the manner in which she raised or interacted with her children, rendered Kentel more susceptible to parental demands or instructions. The evidence shows that the defendant was a fairly typical adolescent, one of three children living under his mother's roof. There is nothing before the court suggesting that Kentel had any particular or unique cognitive or personality characteristics, or that his relationship with his mother was in some way abusive or abnormal, that would have made expert testimony necessary to aid the jury in understanding the fact issues.

Assessed as a whole, it is unlikely that any judge presiding over the defendant's motion to suppress in 2004, or the trial in early 2006, would have found that DiCataldo's proffered testimony met the foundational requirements of Mass. G. Evid. § 702 so as to permit expert testimony on the issue of parental psychological coercion. Absent that testimony, Attorney Davis' failure, either to consult an expert or attempt to present expert testimony, could not have prejudiced the defendant's case. Consequently, his motion for new trial based on ineffective assistance of counsel must fail.

ORDER

So much of the defendant's motion for new trial based on ineffective assistance of counsel is DENIED.